Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1994

GLENN NAKATA, ALVIN K. L. LAU, and
JON DAVID WHITTINGTON,

Petitioners,

vs.

STATE OF HAWAII; JAMES H. DANNENBERG,
in his capacity as Judge of the District Court
of the First Circuit, State of Hawaii, and all
other District Court Judges of the State of Hawaii,

Respondents.

Petition For A Writ of Certiorari
To The Supreme Court of the State of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether due process and fairness permit the retrospective application of statutory amendments, eliminating the right to a jury trial by recharacterizing the criminal offense as petty to cases pending prior to May 21, 1993.

2. Whether the prospective application of a yet unenacted statute by the Court terminating Petitioner Whittington's right to a jury trial in a criminal matter and the Hawaii Supreme Court's failure to decide this properly-raised issue violates Petitioner Whittington's right to Due Process under the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES AFFECTED

In addition to the parties listed in the caption, a number of other parties are affected by this decision. There are currently a number of similar cases which had been stayed in the State of Hawaii District Court awaiting jury trial, which were affected by the decision of the Hawaii Supreme Court in this matter.

There may be additional cases before the Hawaii Supreme Court or before the State of Hawaii District Court that are affected by this case, but the identities of the appellants or parties in those cases are not known to Petitioners. The identities of the parties in any such cases are within the purview of Respondents, or their successors, who would be the appellee in each of those cases.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

LIST OF APPENDICES FOR PETITION FOR WRIT OF CERTIORARI viii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASES 7

AS TO PETITIONER WHITTINGTON 11

CONSOLIDATION OF PETITIONERS' CASES BY THE HAWAII SUPREME COURT 13

DECISION OF THE HAWAII SUPREME COURT 13

A. The First Reserved Question. 13

B. The Second Reserved Question 15

REASONS FOR GRANTING THE WRIT 17

I. Due Process And Fundamental Fairness Are Violated By The Retroactive Application Of Act 128, Session Laws of Hawaii, Regular Session of 1993, Which Extinguished The Petitioners' Right To A Jury Trial After Petitioners Had Waited In Reliance In Excess Of Three Years To Avail Themselves Of A Jury Trial. 17

A. The Recharacterization of HRS § 291-4 As A Petty Offense And the Retrospective Elimination Of Jury Trials By Act 128, Session Laws of Hawaii, Regular Session of 1993, Is An Illegal And Unfair Response To The Tremendous DUI Jury Trial Backlog Caused By The Hawaii Judiciary's Mismanagement. 21

B. The Due Process Guarantees of the Fourteenth Amendment Embrace the Criteria For Ex Post Facto Violations And Apply To The Denial Of Petitioners' Demand For Jury Trials 27

II. The Denial Of Petitioner Whittington's Right To A Jury Trial By Judge Dannenberg Was Based Upon A Law Which Was Not Yet In Existence At The Time The Court Invoked It And Constitutes A Violation Of Petitioners' Right To Due Process As Guaranteed By The Fourteenth Amendment To The United States Constitution. 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Baldwin v. New York,
399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed 2d 437 (1970) . 18, 27

Blanton v. City of North Las Vegas,
489 U.S. 538 (1989) 14, 19

Callan v. Wilson,
127 U.S. 540, 8 S.Ct. 1801, 32 L.Ed. 223 (1888) 19

Cheff v. Schnackenberg,
384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966) . . 19

District of Columbia v. Colts,
282 U.S. 63, 51 S.Ct. 52, 75 L.Ed 177 (1930) 19

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444,
20 L.Ed.2d 491, reh'g denied, 392 U.S. 497,
88 S.Ct. 2270, 20 L.Ed. 2d 1412 (1968) 17, 18

State of Hawaii v. O'Brien,
68 Haw. 38, 704 P.2d 883 (1986) 8, 20

State v. Ikezawa,
75 Haw. 210, 857 P.2d 593 (1993) 28

United States v. Nachtigal,
___ U.S.___, 113 S.Ct. 1073 (1993) 14

TABLE OF AUTHORITIES - Contd.

Page(s)

CONSTITUTIONAL PROVISIONS

United States Constitution, Article I, § 9, Cl. 3 2

United States Constitution, Sixth Amendment 2, 17, 30

United States Constitution, Fourteenth Amendmen8, 17, 29, 33

Hawaii State Constitution, Article III, Section 16 .... 12, 30

Hawaii State Constitution, Article XVI 6

STATUTES

28 U.S.C. 1257 (a). 2

Hawaii Revised Statutes § 1-3 15

Hawaii Revised Statutes § 287-20 10

Hawaii Revised Statutes § 287-22 10

Hawaii Revised Statutes § 291-4 ..... 4, 14-16, 21, 22, 26

Hawaii Revised Statutes § 602-5(2) 11

Hawaii Revised Statutes § 603-21.9 9

RULES

Hawaii Rules of Appellate Procedure, Rule 15 .... 9, 11, 13

Hawaii Rules of Appellate Procedure, Rule 21(a) 13

LEGISLATIVE AUTHORITIES

Act 128, Session Laws of Hawaii,

17th Leg., Reg. Sess. (1993) .. 3, 14-17, 21, 28, 30, 32, 33

H.B. 747, Session Laws of Hawaii,

17th Leg., Reg. Sess. (1993) 13

TABLE OF AUTHORITIES - Contd.

Page(s)

S.B. 811, Session Laws of Hawaii,
17th Leg., Reg. Sess. (1993) 25

OTHER AUTHORITIES

Mass Production Justice and the Constitutional Ideal,
The Mitchie Co. (1970) 24

Sutherland on Statutory Construction,
§ 41.03 (5th ed., 1993) 27

Sutherland on Statutory Construction,
"Criteria of Decision" § 41.05 (5th ed., 1993) 26

LIST OF APPENDICES FOR PETITION FOR WRIT OF CERTIORARI

A. Opinion of Hawaii Supreme Court filed August 2, 1994

B. Hawaii Supreme Court Order Denying Motion for Reconsideration and Orders of Amendment, both filed August 18, 1994

C. Hawaii Supreme Court Order [Consolidating Cases] filed October 12, 1993

D. Hawaii First Circuit Order Reserving Questions of Law Pursuant to Rule 15 of the Hawaii Rules of Appellate Procedure & Findings of Fact filed July 30, 1993

E. Hawaii Supreme Court Order Accepting Questions filed August 18, 1993

F. [Defendants' Nakata & Lau] Motion for Reconsideration filed on August 12, 1994 in the Hawaii Supreme Court

G. Hawaii District Court Transcript of May 4, 1993 Hearing

H. Opening Brief [of Defendants' Nakata & Lau] dated September 16, 1993

I. Reply Brief [of Defendants' Nakata & Lau] filed October 6, 1993

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OPINION BELOW

The consolidated opinion of the Supreme Court of the State of Hawaii is attached to this Petition as Appendix A, and is reported in 76 Haw. 360 and 878 P.2d 699.

JURISDICTION

The judgment of the Supreme Court of the State of Hawaii was entered on August 18, 1994. (Appendix A.) The jurisdiction of this court is invoked under 28 U.S.C. 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 9, Cl. 3 of the United States Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed."

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> **Section 1.** . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATUTES INVOLVED

Act 128, Session Laws of Hawaii, 17th Leg., Reg. Sess. A Bill for An Act Relating to Driving Under the Influence of Intoxicating Liquor, enacted on May 21, 1993, provides in pertinent part:

> SECTION 1. It is the intent of the legislature that individuals charged with the offense of driving under the influence of intoxicating liquor as a first time offender shall not be entitled to a jury trial. . . .
>
> It is the intent of the legislature that the reduced penalties provided for in the Act apply to all pending first offense cases. The legislature further intends that by making the reduced penalties provided for in this Act retroactive to pending cases, it be made clear that such first offenders are not entitled to a jury trial, as the offense is a "petty offense" in the constitutional sense.

SECTION 2. [See, below, Hawaii Revised Statutes, Section 291-4, as amended.]

SECTION 5. This act shall take effect upon its approval; provided that section 2 shall be retroactive for all pending first-offense cases for driving under the influence of intoxicating liquor.

Hawaii Revised Statutes, Section 1-3, provides in pertinent part:

> **§ 1-3 Laws not retrospective.** No law has any retrospective operation unless otherwise expressed or obviously intended.

Hawaii Revised Statutes, Section 291-4, as amended, provides in pertinent part:

> **§ 291-4 Driving under the influence of intoxicating liquor.**
>
> . . .
>
> (b) A person committing the offense of driving under the influence of intoxicating liquor shall be sentenced as follows without possibility of probation or suspension of sentence:
>
> (1) For a first offense, or any offense not preceded within a five-year period by a conviction under this

section, by:

(A) A fourteen-hour minimum alcohol abuse rehabilitation program including education and counseling, other comparable program deemed appropriate by the court; and

(B) Ninety-day prompt suspension of license with absolute prohibition from operating a motor vehicle during suspension of license, or the court may impose, in lieu of ninety-day prompt suspension of license, a minimum thirty-day prompt suspension of license with an absolute prohibition from operating a motor vehicle and, for the remainder of the ninety-day period, a restriction on the license that allows the person to drive for limited work-related purposes and to participate in alcoholism

treatment programs[, and which may require installation of an ignition interlock system as defined in section 286-251]; and

(C) Any one or more of the following:

(i) Seventy-two hours of community service work;

(ii) Not less than forty-eight hours and not more than [thirty] five days of imprisonment; or

(iii) A fine of not less than $150 but not more than $1,000.

Article XVI of the Hawaii State Constitution provides in pertinent part:

APPROVAL OR VETO

Section 16. Every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses and shall thereupon be presented to the governor. If the governor approves it, the governor shall sign it and it shall become law. . . .

RECONSIDERATION AFTER ADJOURNMENT

The governor shall have forty-five days, after the adjournment of the legislature sine die, to consider

> bills presented to the governor less than ten days before such adjournment, or presented after adjournment, and any such bill shall become law on the forty-fifth day unless the governor by proclamation shall have given ten days' notice to the legislature that the governor plans to return such bill with the governor's objections on that day. . . .

STATEMENT OF THE CASES

Petitioners GLENN NAKATA and ALVIN K. L.LAU were arrested and charged on June 10, 1990 and July 30, 1990, respectively, with the offense of Driving Under the Influence of Intoxicating Liquor, in violation of Section 291-4 of the Hawaii Revised Statutes (hereinafter "HRS"). Both Appellants were released from custody after posting bail in the amount of $150.00. Upon arraignment in the District Court in August of 1990, each of the Petitioners requested to be tried by jury and both cases were transferred to Circuit Court. Finding of Facts (Appendix D) were made by the Circuit Court of the First Circuit, State of Hawaii on June 30, 1993 regarding facts and procedure relating to Petitioners' cases and are hereinafter

as "F.F.". This was the first such offense for either petitioner. (F. F. Nos. 1, 2, Appendix D)

Due to the allocation of only one trial court per week for DUI trials in Honolulu and the resulting congestion of the court system (F.F.No.16, Appendix D), Petitioners' cases were still pending on May 21, 1993. It was at this time that new legislation clarifying and reducing the sentencing provisions for first- and second-time DUI defendants was signed into law by Governor John Waihe'e. Act 128 (H.B. 747), supra, reduced the penalty for a first-time DUI defendant from thirty days to five days and declared that first- time DUI defendants were no longer entitled to jury trials. (F.F. No. 6, Appendix D) The Petitioners relied upon the holding of State of Hawaii v. O'Brien, 68 Haw. 38, 704 P.2d 883 (1986) in demanding their right to a jury trial at arraignment.[1]

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[1] The Hawai'i Supreme Court in State v. O'Brien, 68 Haw. 38, 704 P.2d 383 (1986) in assessing the DUI statutory scheme in Hawai'i and noting that the threat of the loss of the drivers license for a period of time indicated that the community did not view a DUI as a petty offense, found DUI to be a serious offense despite the fact that the statutory penalty did not exceed six months.

On June 25, 1993, the prosecution filed motions in the Circuit Court of the First Circuit, State of Hawaii, requesting that the three pending DUI cases[2] to the District Court without jury trial. A hearing on this matter was conducted in the Circuit Court on July 29, 1993, resulting in part in the issuance of Findings of Fact referred to above. The Honorable Dexter D. Del Rosario, Judge of the First Circuit Court, found that the motions presented constitutional issues of a far-reaching and important nature and pursuant to HRS § 603-21.9 and Rule 15 of the Hawaii Rules of Appellate Procedure (hereinafter to referred to as "HRAP") ordered that the two questions be reserved for consideration by the Hawaii appellate courts. (Appendix D.)

The Circuit Court took judicial notice of the fact that there had been jury trials in the Circuit Court subsequent to May 21, 1993 for Appellants who were arrested and charged for offenses occurring both subsequent and prior to Petitioners arrest. (F.F.Nos 7, 11, Appendix D.) The trial court also found the

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[2] The third case involved defendant Eddie Daoang, who was represented by the Hawai'i public defender.

following collateral consequences for a person convicted of DUI. An individual convicted of DUI must comply with the financial responsibility requirement under HRS § 287-20. (F.F.Nos. 9, 10, Appendix D.) This requirement may be met in one of the four following ways: (1) Proof of insurance via Form SR-22; (2) Posting a bond in accordance with the Act; (3) depositing money or securities in the amount of $25,000.00; or (4) submitting a self-insurance certificate pursuant to HRS § 287-22. (F.F. No. 18b, Appendix D.) A convicted DUI defendant is mandated to comply with these requirements for a period of three years and non-compliance will result in the individuals being suspended for three years or until compliance. (F.F. Nos. 18b, 18f, Appendix D.) Sixty-five per cent of the convicted DUI defendants elect to comply with these requirements through the SR-22 form. (F.F.No. 18c, Appendix D.) The insurance rate of an individual without any prior convictions or violations on their driving record will increase by a factor of seven or eight times the existing insurance rate upon that individuals conviction for DUI. (F.F. No. 19a, 19b, 19c, Appendix D.) The average insurance rate charged

for a Toyota Camry for a person with a clean driving record is approximately $1,086.00 per year in Hawaii. The same coverage for convicted DUI defendant in Hawaii would increase to $7,913.00 per year. (F.F.No. 19, Appendix D.)

The Supreme Court of the State of Hawaii, upon consideration of the Order Reserving Questions of Law Pursuant to HRAP Rule 15 and without answering the questions, ordered the Petitioners, as "Appellants," to file an opening brief no later than September 7, 1993 and the Respondent, as "Appellee" to answer within 20 days. The Hawaii Supreme Court has jurisdiction to entertain an Order Reserving Questions of Law, pursuant to Rule 15, HRAP and HRS § 602-5(2) [1985 and 1990 (Supp.)].

AS TO PETITIONER WHITTINGTON

Petitioner Whittington appeared, through his counsel, before the Honorable James H. Dannenberg, Judge of the District Court of the First Circuit, State of Hawaii on May 4, 1993 for a trial setting hearing. Petitioner Whittington was charged with driving under the influence of intoxicating liquor (hereinafter "DUI").

under the influence of intoxicating liquor (hereinafter "DUI"). The court was informed that Petitioner Whittington had no prior DUI convictions and was therefor a first-time offender and that Petitioner Whittington, by and through his counsel of record demanded a jury trial. Judge Dannenberg denied Petitioner Whittington a jury trial, based upon Judge Dannenberg's expectation that the Governor of Hawaii would sign H.B.747 into law sometime in the near future and thereby extinguish Petitioner Whittington's right as a first time DUI defendant to a trial by jury. This was done over the objection of Petitioner Whittington's attorney of record. (Transcript of Proceedings in the District Court for the First Circuit, May 4, 1993, attached hereto as Appendix G.) Article III, Section 16 of the Hawaii State Constitution requires that for a bill to become law, it must be signed by the Governor unless forty-five (45) days have elapsed after the adjournment of the legislative session. Neither of these facts were operative at the time that Judge Dannenberg denied Petitioner Whittington's timely request for a jury trial. Petitioner Whittington filed a Petition for a Writ of Mandamus

and/or Prohibition in the Hawaii Supreme Court pursuant to Rule 21(a) of HRAP on June 29,1993.

CONSOLIDATION OF PETITIONERS' CASES BY THE HAWAII SUPREME COURT

The Hawaii Supreme Court, in an order dated October 12, 1993, consolidated State v. Nakata, et al., No. 17317, and Whittington v. Dannenberg, No. 17228, for the reason that the cases raised the same issues for consideration. (Appendix C.)

DECISION OF THE HAWAII SUPREME COURT

The Hawaii Supreme Court held that Petitioners no longer had a right to a jury trial as a result of the enactment of H.B.747. The Court applied both Federal and a State constitutional standards in their analysis of the two questions reserved pursuant to Rule 15, HRAP. (Appendix A.)

A. The First Reserved Question.

Whether the amendments to the sentencing provisions of HRS § 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, Eliminate the right to jury trial for defendants charged with a first offense under HRS § 291-4.

The Hawai Supreme Court, applying Federal Constitutional standards, found that a first-time DUI offense, under HRS § 291-4, as amended by Act 128, supra, fell well below the six month threshold enunciated in Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) and is therefore presumptively "petty". The Hawaii Supreme Court continued to find that the possible mix of penalties for a first time DUI offender did not overcome the presumptively "petty" threshold requirement stated in United States v. Nachtigal, ___ U.S.___, 113 S.Ct. 1073, 1073 (1993).

The Hawaii Supreme Court also found that under a state constitutional analysis a first time DUI offense, as reconfigured by the Hawaii legislature in Act 128, supra, is a "petty" offense for which a defendant is not entitled to a Jury trial. (Appendix A, at 20-38.)

B. The Second Reserved Question

If the amendments to the sentencing provisions of HRS § 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, do eliminate the right to jury trial, whether the deprivation of such a right may be applied retrospectively to alleged offenses occurring prior to the enactment of the Act.

The Hawaii Supreme Court, in its Federal Analysis of the second reserved question noted that Section 5 of Act 128, supra, stated that it takes effect upon, "provided that [the reduced penalties] shall be retroactive for all pending first-offense cases for [DUI]". Act 128, 1993 Haw. Sess. Laws at 181. HRS § 291-4, as amended by Act 128, supra, was found to comply with HRS § 1-3 and therefore to apply retroactively to the pending cases. (Appendix A, at 53-55.) Furthermore the statute as amended, was found not to violate the ex post facto clause or the due process clause of the United States Constitution.The Hawaii Court found no Federal ex post facto violation because Act 128, supra: 1) reduced the penalty for a first time DUI conviction; 2)

affects only the procedural determination of whether a first time DUI defendant will be tried by a judge or jury; 3) does not divest or compromise the right of a first time DUI defendant to a fair and impartial trial in any way; and 4) does not result in any substantial prejudice to petitioners from the retrospective application of a non-jury trial to their cases. (Appendix A, 55-70.) The Hawaii Supreme Court further stated that the petitioners failed to show how they would be substantially prejudiced by the retroactive application of Act 128, supra, since they would receive an impartial trial (albeit a non-jury trial) and would face lesser penalties under the amended version of HRS § 291-4. (Appendix A, 68-71.)

Your Petitioners now seek a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. DUE PROCESS AND FUNDAMENTAL FAIRNESS ARE VIOLATED BY THE RETROACTIVE APPLICATION OF ACT 128, SESSION LAWS OF HAWAII, REGULAR SESSION OF 1993, WHICH EXTINGUISHED THE PETITIONERS' RIGHT TO A JURY TRIAL AFTER PETITIONERS HAD WAITED IN RELIANCE IN EXCESS OF THREE YEARS TO AVAIL THEMSELVES OF A JURY TRIAL.

The right to a jury trial in a criminal case is guaranteed by the Sixth Amendment to the Constitution of the United States of America and that guarantee is extended to the States by the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, reh'g denied, 392 U.S. 497, 88 S.Ct. 2270, 20 L.Ed. 2d 1412 (1968). The United States Supreme Court, as per Justice White, stated:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by

> the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too strong to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased ,or eccentric judge. If the Defendant preferred the common-sense judgement of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitution reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Duncan, supra, 391 U.S. at 155-6, 88 S.Ct. at 1451.

The right to a jury trial under the Federal Constitution only extends to offenses of a serious nature and individuals charged with a petty offense may not be entitled to a jury trial. Baldwin

v. New York , 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed 2d 437 (1970); Cheff v. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966); District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed 177 (1930); Callan v. Wilson, 127 U.S. 540, 8 S.Ct. 1801, 32 L.Ed. 223 (1888).

The courts primarily look to the length of the sentence to determine whether or not the offense is to be deemed "serious". If the sentence exceeds six months then the offense is deemed to be "serious" and the right to a jury trial under the Federal Constitution attaches to the offense. Where the sentence does not exceed six months the offense may be considered petty and a jury trial may not be required. Blanton v. North Las Vegas, supra 489 U.S. at 543-544. However, the Court in Blanton v. North Las Vegas, supra 489 U.S. at 542 stated that "[I]n using the word 'penalty,' we do not refer solely to the maximum prison term authorized for a particular offense." A Legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense. The Blanton Court continued "[w]e thus examine 'whether the length of the

authorized term or the seriousness of other punishment is enough in itself to require a jury trials'." [Emphasis in original].

Petitioners Nakata and Lau demanded jury trials in a timely fashion at their respective arraignments pursuant to their then vested right under the Hawaii Supreme Courts ruling in State v. O'Brien, 68 Haw. 38, 704 P.2d 883 (1985). (F.F. No. 2, Appendix D.) Petitioners (excepting Petitioner Whittington) then waited approximately three years for their jury trial as a result of the Hawaii judiciary's creation of a DUI trial backlog. During this jury trial backlog, other first-time DUI defendants who had been arrested and arraigned after Petitioners Nakata and Lau were afforded jury trials for no other known reasons than an arbitrary and capricious court calendar. (F.F. No. 16, Appendix D.)

A. The Recharacterization of HRS § 291-4 As A Petty Offense And the Retrospective Elimination Of Jury Trials By Act 128, Session Laws of Hawaii, Regular Session of 1993, Is An Illegal And Unfair Response To The Tremendous DUI Jury Trial Backlog Caused By The Hawaii Judiciary's Mismanagement.

The stipulated testimony of Gwen Ha, a representative of the Criminal Assignments Division of the Circuit Court indicates that only one Circuit courtroom is primarily used for hearing DUI trials and that as of July 30, 1993, 3,375 DUI were pending trial. It was not stated what percentage of these were first-time DUI offenses. (F.F. No. 16, Appendix D.) The stipulated testimony of Steven Alm, Misdemeanor Prosecution Director at Paragraph 17 of the Findings of Fact-Reserved Questions of Law indicates that the State very rarely plea bargains any DUI offense to a lesser charge due to the enhanced sentencing scheme provided in HRS § 291-4 for repeat offenders. (F.F. No. 17, Appendix D.)

While an administrative judicial crisis may exist with respect to DUI jury trials, a substantial portion of blame for this

crisis lays with a court system that is only willing to allocate primarily one courtroom for DUI jury trials. The court system with its meager allocation of one courtroom created the DUI jury trial crisis. The State is equally culpable for its unwillingness to reduce any DUI charge to a lesser offense for fear of losing the hook on the enhanced sentencing scheme under HRS § 291-4 for repeat DUI offenders. The State simply refused to screen its DUI cases.

The influx of substantial numbers of criminal cases is not a problem or issue which has only recently arisen.

> Our metropolitan criminal courts are too crowded. There are too many cases, too few judges, and inadequate physical resources to cope with the thousands of cases which annually come before them. The constant trend toward urbanization and the steady increases in the rate of urban crime have not been accompanied by increases in judicial manpower or improvements in judicial machinery adequate to deal with the problem. Frequently, procedures which have their origins in the counties of rural America -- or, indeed, the shires and hamlets of ancient Britain -- are still utilized in urban courts which handle more cases

in a day than came before many of their predecessors in a year. Procedures designed for felony cases have uncritically been accepted as the norm for the judicial determination of misdemeanors and petty offenses. In theory the system still contemplates the adversary trial as the basic device for the disposition of charges, despite the reality that many or most of the cases will be determined by out-of-court plea bargaining in a process which frequently seeks judicial intervention only for the purpose of placing an imprimatur upon a compromise.

...The increase in the numbers of cases alone might have placed more pressure on our system than could be tolerated without increases in manpower and facilities and changes in procedures. But the problem has other dimensions, also.

The criminal courts must now deal with defendants who have constitutional and statutory rights which, if asserted and respected, may pose meaningful bars to summary disposition. *Mapp, Miranda, and Wade* and their progeny provide procedural rights which require regular adjudications of a type rarely involved in prosecutions even a decade ago. Gideon v. Wainwright and the movement toward bail reform make the right to a jury trial a practical possibility

rather than an illusion, and provided both a viable technique and an incentive to delay by a defendant.

...I do not suggest that these developments are unfortunate. On the contrary, the so-called revolution in criminal procedure has been, in my opinion, one of the great accomplishments of America during the last decade.

We have eradicated much of the "invidious discrimination" between rich and poor in the criminal process. We have implemented rights which were illusory in the past. A national concept of criminal due process has developed from the decisions which have afforded most of the basic protections of the Bill of Rights to defendant tried in state courts. These are profound and desirable changes. My point is only the obvious one-that the evolution of the criminal process toward a real adversary system in which meaningful rights can be asserted by defendants has placed substantial additional burdens upon our criminal courts. [Footnotes omitted]

The quotations above are from an article by A. Kenneth Pye, Dean of Law, Duke University, which appeared in Mass Production Justice and the Constitutional Ideal, The Mitchie Co.

(1970) almost twenty-five years ago. The administrative burden of an urban court system twenty-five years ago was as intense then as is the administrative burden confronting the Honolulu court system today.

In 1993, S.B. 811, 17th Leg., Reg. Sess. provided both the legislature and the court system an opportunity to at least partially alleviate the DUI backlog problem. S.B. 811, supra, would have created an incentive for deferred acceptance of guilty (hereinafter, "DAG") pleas for first-time offenders by removing the SR-22 Proof of Financial Responsibility requirement. However, S.B. 811, supra, died in committee.

Counsel would admit that some fault lies with the first-time offenders since they have refused to gently accept summary adjudication of their charges by a judge and have insisted upon a jury trial. But the primary reason for this judicial administrative crisis involving DUI trials are the above-described policies of the court system and the State.

The precedent set by the Hawai'i Supreme Court in permitting the court system and the State to solve a crisis of their

own creation by semantically terminating a constitutional right is a dangerous one. Will the State Legislature, in three years, revise HRS § 291-4, et seq., to deprive second-time DUI defendants of the right to trial because another backlog DUI crisis exists as a result of the use of only one courtroom for DUI trials and the refusal of the State to reduce DUI charges to lesser offenses?

It is fundamentally unfair after forcing Petitioners to wait over three years, to then divest them of the fundamental right to a jury trial. It is axiomatic that such a fundamentally unfair divestiture of the right to a jury trial, applied retrospectively, goes to the heart of due process. It has been observed that "[o]ne of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect substantial interests ought not be defeated." Sutherland on Statutory Construction, "Criteria of Decision" § 41.05 at 370 (5th ed., 1993).

Again, while the vital importance of the right to a jury trial can not be exaggerated, the effect, after forcing the petitioners to

wait over three years, of retrospectively depriving them of its benefit is particularly onerous. Justice White, in Baldwin v. New York, supra, 399 U.S. at 72, 26 L. Ed.2d at 442 stated:

> ... the primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgement of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.

It is the position of Petitioners that the retroactive application of Act 128, supra, and the attendant deprivation of the right to trial by jury is inherently prejudicial and unfair, so as to constitute a violation of Due Process under the United States Constitution.

B. The Due Process Guarantees of the Fourteenth Amendment Embrace the Criteria For Ex Post Facto Violations And Apply To The Denial Of Petitioners' Demand For Jury Trials.

Sutherland on Statutory Construction, § 41.03, p. 345 stated

with respect to Retroactive legislation that:

> Notwithstanding the aforementioned explicit constitutional limitations on enactment of retroactive legislation, the constitutional ground most often used in attacking them is that they violate due process guarantees in the Fifth and Fourteenth Amendments. The kinship has been recognized even though the ex post facto provision is held to refer only to criminal statutes. The result is that protection from improper retroactivity has been included within the due process clause.

The Hawaii Supreme Court Opinion in this matter concluded that the retroactive application of Act 128, supra, satisfied any requirement of fundamental fairness as enunciated in State v. Ikezawa, 75 Haw. 210, 857 P.2d 593 (1993). The Opinion of the Hawaii Supreme Court (Appendix A, at 59-60.) found that the retroactive application of Act 128, supra, was not "outcome-determinative" and therefore the Petitioners had not shown that they would be substantially prejudiced by it s retroactive application.

The Petitioners are part of a group of first-time DUI

defendants in Hawaii, who have waited in most cases for over three years to have jury trials. It seems patently absurd that a misdemeanor court system would afford only one courtroom for this particular misdemeanor charge, and thereby intentionally create a case backlog of thousands of DUI jury trials. In a sense, the Petitioners, during their three-year wait for a jury trial, had impliedly waived their right to a speedy trial based upon their timely demand for and expectation of a jury trial. The passage of such a long period of time and the subsequent unexpected extinguishment of the right to a jury trial constitutes prejudice at a level that violates the due process requirement of the Fourteenth Amendment to the United States Constitution.

The linchpin in the Hawaii Supreme Court's finding of no prejudice arising from the unexpected extinguishment of Petitioner' right to a jury trial is the Court's premise that a judge -tried case always affords the same amount and degree of fairness as a jury trial. It follows, given the Hawaii Supreme Court's above stated premise, that if prejudice were required to be shown when a non-jury trial was conducted without a proper waiver by

the defendant in a constitutionally serious criminal matter, there could never be a reversal of a conviction for violation of this fundamental right. The right to a jury trial in a criminal case, as guaranteed by the Sixth Amendment to the United States Constitution, would thereby be rendered meaningless.

II. THE DENIAL OF PETITIONER WHITTINGTON'S RIGHT TO A JURY TRIAL BY JUDGE DANNENBERG WAS BASED UPON A LAW WHICH WAS NOT YET IN EXISTENCE AT THE TIME THE COURT INVOKED IT AND CONSTITUTES A VIOLATION OF PETITIONERS' RIGHT TO DUE PROCESS AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Hawaii State Constitution, Article III, Section 16 requires that for a bill to become law, it must be signed by the Governor. On May 4, 1993, the Honorable James Dannenberg refused to grant Petitioner Whittington's demand for a jury trial based primarily upon the Judge's belief that Act 128, supra, would soon become law and thereby eliminate Petitioner

Whittington's right to a jury trial as a first-time DUI offender. The following exchange between Judge Dannenberg and the attorney for Petitioner Whittington, at the trial-setting hearing on May 4, 1993 illustrates the court's intent to presumptively extinguish Petitioner Whittington's right to jury trial.

THE COURT: Okay. I take it this is a first offense, is that correct?

MR. ROSS: Yes, Your Honor.

THE COURT: Okay. Well, I -- as you heard me say---

MR. ROSS: However, we requested this before the governor signed any bill into an act. This is just proposed legislation. It's not fact yet. He could veto it.

THE COURT: He could. So we'll -- and if he does, then---

MR. ROSS: Well, you've got a court above you that's going to remand everything anyway, so---

THE COURT: Actually it isn't, from what I hear, so -- the cases are going to stay in limbo for a while.

Where is Mr. Whittington, do you know?

MR. ROSS: Well, generally speaking, when I

make a jury demand, I don't tell people to come.

THE COURT: Right. I understand.

MR. ROSS: Now whether I get in trouble for it, that's a new matter. I mean -- I haven't up to now.

THE COURT: No, you haven't had notice, so I'm not going to hold you responsible for it. Let me ask this. Is that State ready?

MR. BAAKE: Yes, it is, Your Honor.

THE COURT: All right. What I'm going to do is this. I'm going to note the State's ready. I'll continue this. I'm going to, at this point, deny the request for jury trial. I'm going to set it for trial.

If something happens that indicates that the new legislation isn't going into effect, you can always get the jury at that point. But, I don't see any harm or foul at this point, since you're not going to get a trial date until 1997 anyways, if you go to Circuit Court.

(Appendix G.) Act 128, supra, was finally signed into law by the Governor of Hawaii on May 21, 1993.

The situation in Petitioner Whittington's case illustrates the absurd lengths to which the Hawaii judiciary would go, particularly the District Court, to avoid affording a first-time DUI defendant a jury trial. This invocation of a non-existent law would be almost humorous, if it did not involve such a

Kafkaesque approach to criminal trial procedure and result in the loss to Petitioner Whittington of his fundamental right to a jury trial. Act 128, supra, contains no provision known to Petitioners which permits the retroactive application of it prior to its enactment. There is no State of Hawaii statute known to Petitioners which permit the retroactive application of a non-existent law to Petitioner Whittington's situation. There is no Hawaii case law known to Petitioners which would as well permit the preemptive application of a non-existent statute. Finally, the Hawaii Supreme Court did not address this issue in its opinion (Appendix A), even though it was properly preserved, presented and briefed to the Hawaii Supreme Court. The Hawaii Supreme Court did not find any other state or federal grounds which would obviate deciding Petitioner Whittington's particular and peculiar situation.

It is Petitioner Whittington's position that the use of a nonexistent law to deprive him of his right to a jury trial is a violation of Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution. It may also be seen as a troubling sign of an inability and unwillingness to manage in a fair and creative manner the growing criminal caseload of this decade.

CONCLUSION

The extinguishment of the fundamental right to a jury trial in a criminal matter and under the facts of this petition is a

violation of due process as guaranteed by the Fourteenth Amendment to the United States Constitution. Petitioners NAKATA and LAU properly demanded a jury trial over three years ago in a misdemeanor DUI case. Petitioners had no reason to expect that the right to a jury trial, then guaranteed and vested by the Hawaii Supreme Court's decision in State v. O'Brien, supra, would be retroactively extinguished by the Hawai'i State legislature.

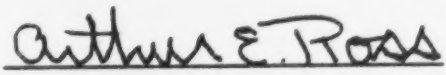
But for the expectation of a vested right to jury trial on the charge of being first-time DUI offenders, Petitioners would certainly never have waited twisting and spinning in judicial limbo for over three years to conclude the disposition of these misdemeanor matters. It is patently unfair and a violation of due process to purposely permit the DUI jury trial caseload to back up into the thousands and then solve this judicially-created problem by extinguishing the right to a jury trial. This is true, particularly in the present situation, where the Petitioners impliedly waived their right to a speedy trial based upon their demand for and reasonable expectation of receiving a jury trial.

The most chilling example of the Hawai'i Supreme Court's cynical approach to remedying the caseload crisis is the Kafkaesque solution it employed in Petitioner Whittington's case. First, the trial court denied Petitioner Whittington's demand for a jury trial based upon a then-non-existent statute. Then, the Hawai'i Supreme Court refused to decide the matter without

providing any alternative and adequate grounds for denying Petitioner Whittington's appeal. To permit these gross violations of due process, is to encourage further and future such violations all in the name of judicial management and administration. It really will become a case of "the tail wagging the dog." Accordingly, for the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated: Honolulu, Hawaii, November 9, 1994.

Respectfully submitted:



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Appendix "A"

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

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[Filed Aug. 2, 1994]

STATE OF HAWAI'I, Plaintiff-Appellee,
v. GLENN NAKATA, Defendant-Appellant
(CR. NO. 90-1679)

STATE OF HAWAI'I, Plaintiff-Appellee,
v. ALVIN K. L. LAU, Defendant-Appellant
(CR. NO. 90-1657)

STATE OF HAWAI'I, Plaintiff-Appellee,
v. EDDIE DAOANG, Defendant-Appellant
(CR. NO. 90-1838)

NO. 17317

and

JON DAVID WHITTINGTON, Petitioner,
v. JAMES H. DANNENBERG, in his capacity as Judge of the District Court of the First Circuit, State of Hawai'i, and all other District Court Judges of the State of Hawai'i, STATE OF HAWAI'I, the real party in interest, Respondents

NO. 17228

PETITION FOR WRIT OF MANDAMUS
AND/OR PROHIBITION

(CASE NOS. OF 5/4/93)

AUGUST 18, 1994

MOON, C.J., KLEIN, LEVINSON,
NAKAYAMA, AND RAMIL, JJ.

OPINION OF THE COURT BY MOON, C.J.

In 1990, defendants-appellants Glenn Nakata, Alvin Lay, and Eddie Daoang (collectively, the defendants) each requested a jury trial in their individual case on the charge of first-offense driving under the influence of intoxicating liquor (DUI), in violation of Hawai'i Revised Statutes (HRS) § 291-4 (1985). Subsequently, the Hawai'i State Legislature enacted Act 128, 1993 Haw. Sess. Laws 179 (Act 128), which amended the DUI statute by lowering the penalties for a first offense, with the intent of eliminating the right to a jury trial for a first-offense DUI charge. Act 128 also provided for retroactive application too all pending first-offense DUI cases.

After the effective date of Act 128, plaintiff-appellee State of Hawai'i (the prosecution) moved to remand each of the defendants' cases to the district court for bench trials. The First Circuit Court

consolidated the three cases, issued findings of fact, and reserved the following two questions of law, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 15[1] and HRS § 602-5(2) (Supp. 1992),[2]

> 1. Whether the amendments to the sentencing provisions of HRS [§] 291-4 provided Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, eliminate [] the right to jury trial for defendants charged with a first offense under HRS § 291-4.
>
> 2. If the amendments to the sentencing provisions of HRS [§] 291-4 provided in Act 128, Session Laws of Hawaii,

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[1] HRAP 15 provides in part:

> **Rule 15. Reserved Questions. (a) From What Court.** A circuit court, district court . . . and any other court empowered by statute, may reserve for the consideration of the Hawaii appellate courts a question of law arising in any proceedings before it. Questions may be reserved on motion of any party or on the court's own motion.

[2] HRS § 602-5(2) provides:

> **§ 602-5 Jurisdiction and powers.** The supreme court shall have jurisdiction and powers as follows:
>
> . . . .
>
> (2) To answer, in its discretion, any quesiton of law reserved by a circuit court, the land court, or the tax appeal court, or any questions or proposition of law certified to it by a federal district or appellate court if the supreme court shall so provide by rule [.]

> Regular Session of 1993, effective May 21, 1993, do eliminate the right to jury trial, whether the deprivation of such a right may be applied retrospectively to alleged offenses occurring prior to the enactment of the Act.

We, in turn, consolidated No. 17371 with No. 17228, a petition for writ of prohibition and/or mandamus (petition for writ), filed by Jon David Whittington.[3] Whittington seeks an order (1) barring the district court from hearing his case at a bench trial and (2) committing the case to circuit court for a jury trial.

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[3] Hereafter, we shall refer to the defendants and petitioner Whittington collectively as "appellants." Likewise, we attribute individual arguments to all appellants. We note that the Office of the Prosecuting Attorney of the City and County of Honolulu represented plaintiff-appellee State of Hawai'i in No. 17371 and filed an answering brief. The Attorney General of Hawai'i, representing the respondents in No. 17228, filed an answer to the writ as well as an amicus brief in No. 17317. In this opinion, we consolidate the prosecutor's and attorney general's arguments and collectively refer to plaintiff-appellee and respondents as "the prosecution."

We answer both reserved questions in the affirmative and, accordingly, deny Whittington's petition for writ.

I. BACKGROUND

Defendants Daoang, Lau, and Nakata, were arrested for DUI on May 25, 1990, June 10, 1990, and July 30, 1990, respectively, each being charged pursuant to HRS § 291-4 with a first-offense DUI violation. Relying on State v. O'Brien, 68 Haw. 38, 704 P.2d 883 (1985), they each requested jury trials, and accordingly, the cases were transferred to the First Circuit Court. While their jury trials were pending, the prosecution, on June 25, 1993, filed motions for remand to the district court. As previously noted, the trial court issued findings of fact and reserved the two aforementioned questions.

Whittington was arrested for first-offense

DUI sometime before May 4, 1993.[4] On May 4, 1993, he demanded a jury trial; however, the district court denied his demand and set the case for a bench trial. Whittington subsequently filed his petition for writ, which we consolidated with No. 17317 because our disposition of the reserved questions would also dictate the disposition of Whittington's petition.

The defendants are not alone in awaiting jury trials. The trial court found that as of July 30, 1993, 3,375 jury trial-DUI cases were pending in the First Circuit Court, although not all involved first-time offenders. The Court also found that one First Circuit courtroom is primarily responsible for hearing DUI jury trials and that the prosecution rarely plea-bargains DUI offenses to lesser charges due to the enhanced sentencing scheme provided in HRS § 291-4 for repeat offenders. In

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[4] The record does not reflect Whittington's arrest date.

passing Act 128, a legislative committee stated that

> there is currently a backlog of approximately 3,000 DUI cases. . . . [A] high percentage of these DUI cases involved first time offenders. . . . This bill will alleviate the current backlog that is overwhelming the judicial system, and will allow for timely adjudication of repeat offenders who pose the greatest risk to the community and public safety.

Sen. Stand. Comm. Rep. No. 1107, in 1993 Senate Journal, at 1177. The House Judiciary Committee determined that

> it would take 5 to 6 Circuit Courts handling nothing but DUI jury trials to clear the backlog and keep up with new cases. . . . At the same time, the District Court in the First Circuit is capable of disposing of non-jury DUI cases at the rate of 4 to 16 per day, per courtroom, for[, among other] reason[s], that there are many changes of plea when it is apparent that trial is ready to begin[.]

Hse. Stand. Comm. Rep. No. 600, in 1993 House Journal, at 1212.

At the time of the defendants' arrests, the penalty provisions of HRS § 291-4, as amended in 1989, provided for "[n]ot less than forty-eigth hours of imprisonment," with no stated

maximum jail term for a first offense.[5] Additionally, a first-time DUI offender could be sentenced to (a) a fourteen hour minimum alcohol abuse rehabilitation program, (b) a maximum ninety-day suspension of license, (c) seventy-two hours of community service, and (d) a fine of not less than $150 but not more than $1,000. See Act 128, 1989 Haw. Sess. Laws 248.

For a second offense, committed within five years of a prior conviction, a defendant could be sentenced to "[n]ot less then forty-eight consecutive hours of imprisonment" again, with not stated maximum jail term.[6] In addition, a second-time offender could receive (a) prompt suspension of license for one year, (b) eighty hours of community service, and (c) a fine of not less than $500 but no more than $1,000.

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[5] As we noted in O'Brien, "logic dictates that the maximum terms of imprisonment for first and second offenses cannot exceed that mandated for a third offense. Therefore, the maximum imprisonment [for a first- and second-offense] must also be 180 days." O'Brien, 68 Haw. at 44 n.5, 704 P.2d at 887 n. 5.

[6] See, supra note 5.

Id. at 249.

For a third offense, the stated minimum jail time was ten days, with a maximum of "one hundred eighty days of imprisonment." Id. The fine provision for a third-time offender remained the same as for a second-time offender; however, the statute provided for "[r]evocation of license for a period of not less than one year but not more than five years[.]" Id. Subsection (c) also provided that a second- and third-time offender "shall . . . be referred to a substance abuse counselor. . . for an assessment of the offender's alcohol abuse or dependence and the need for appropriate treatment." Id.

In 1990, the legislature enacted the following amendments to HRS § 291-4: (1) established a maximum thirty- and sixty-day term of imprisonment for a first- and second-offense DUI, respectively; (2) required that "at least forty-eight hours [of imprisonment for a second- and third-offense DUI] shall be

served consecutively;" and (3) added the provision that the court may order the installation of an ignition interlock system[7] in the case of first-time offenders. See Act 188, 1990 Haw. Sess. Laws 410-11. The 1990 amendments became effective on August 1, 1991.

Act 128, which became effective on May 21, 1993, (1) reduced the maximum jail sentence for a first-offense DUI charge under HRS § 291-4 from thirty days to five days, (2) repealed the ignition interlock provision for first-time offenders, and (3) provided for retroactive-offense DUI cases.[8]

We examined the 1990 amendments in State v. Jordan, 72 Haw. 597, 825 P.2d 1065 (1992), and

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[7] An "ignition interlock system" is a mechanical device affixed to the ignition system of a motor vehicle which prevents a vehicle from being started without first testing a sample of the driver's breath for a blood alcohol concentration. HRS § 286-51 (Supp. 1992).

[8] Section 5 of aCt 128 provides that it takes effect upon approval "providing that [the reduced penalties] shall be retroactive for all pending first-offense cases for [DUI]." 1993 Haw. Sess. Laws at 181.

held that, despite the reduced maximum prison sentence for first- and second-offense DUI from 180 days to thirty and sixty days, respectively, DUI remained a serious crime to which the right to a jury trial attached. Id. at 601, 825 P.2d at 1068. The 1993 legislature promulgated Act 128 partially in response to Jordan. In passing Act 128 and providing for its retroactive application, the legislature stated:

> It is the intent of the legislature that individuals charged with the offense of [DUI] as a first time offender shall not be entitled to a jury trial. . . .
>
> It is the intent of the legislature that the reduced penalties provided for in the Act apply to all pending first offense cases. The legislature further intends that by making the reduced penalties provided for in this Act retroactive to pending cases, it be made clear that such first offenders are not entitled to a jury trial, as the offense is a "petty offense" in the constitutional sense.

Act 128, 1993 Haw. Sess. Laws at 179-80.

II. STANDARDS OF REVIEW

The issues presented by the questions reserved pursuant to HRAP 15 are questions of law. We review questions of law under the right/wrong standard. In re Holt, 75 Haw. 224, 232, 857 P.2d 1355, 1359, reconsideration denied, ___ Haw. ___, 863 P. 2d 989 (1993).

A writ of mandamus is "an extraordinary remedy that is usually not issued unled the petitioner demonstrates: (1) a clear and indisputable right to relief; and (2) a lack of other means to adequately redress the alleged wrong or obtain the requested action." Tanaka v. Nagata, ___ Haw. ___, ___, 868 P.2d 450, 453 (1994) (citation omitted).[9]

Legislative enactments are ordinarily presumed constitutional. Pary v. Judicial Selection Comm'n, 75 Haw. 333, 340, 861 P.2d 723, 727 (1993). In the face of the presumption, a party challenging a statute has

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[9] In light of our affirmative answers to the reserved questions, we need not reach the question of whether a writ of mandamus is the appropriate means of relief in Whittington's situation.

the burden of proving unconstitutionality beyond a reasonable doubt; that is, the constitutional defect must be clear, manifest, and unmistakable. Id.

III. DISCUSSION

We begin by analyzing the first reserved question under the jury trial provisions of both the United States and Hawai'i Constitutions. We then analyze the question of applying Act 128 retroactively. Finally, we address appellants' equal protection and separation of powers arguments.

A. The First Reserved Question

> Whether the amendments to the sentencing provisions of HRS [§] 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, eliminate[] the right to a jury trial for defendants charged with a first offense under HRS § 291-4.

1. Federal Constitutional Analysis

The United States Supreme Court has interpreted the United States Constitution's

sixth amendment right to a jury trial more narrowly than this court has interpreted the Hawai'i Constitution's counterpart, article I, § 14. Compare Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (no right to a jury trial for a DUI charge with a maximum possible prison sentence of six month) with State v. O'Brien, 68 Haw. 38, 704 P.2d 883 (1985) (right to a jury trial for DUI offense with maximum of 180 days for first and repear offenders) and State v. Jordan, 72 Haw. 597, 825 P.2d 1065 (1992) (right to jury trial for a first- and second-offense DUI having a maximum sentence of thirty and sixty days, respectively).

The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury [.]" This fundamental right applies to the states through the fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 149-50, reh'g denied, 392 U.S. 947 (1968). However, the right is not absolute;

"petty offenses" are not subject to the sixth amendment guaranty of a jury trial. Id. at 159. Thus, based on the reserved questions, the inquiry narrows to whether first-offense DUI under HRS § 291-4, as amended by Act 128, is a constitutionally petty offense for purposes of the sixth amendment.

In Blanton, the Supreme Court stated the test as follows:

> In determining whether a particular offense should be categorized as "petty," our early decisions focused on the nature of the offense and on whether it was triable by jury at common law. In recent years, however, we have sought more "objective indications of the seriousness with which society regards the offense." "[W]e have found the most relevant such criteria in the severity of the maximum authorized penalty."

489 U.S. at 541 (citations omitted) (emphasis added). The Court explained that:

> In using the word "penalty," we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense. . . . Primary emphasis, however, must be placed on the maximum authorized

period of incarceration.

Id. at 542 (citations omitted) (emphasis added).

The Court in Blanton held that a charge under Nevada's DUI statute, which had a maximum authorized prison term of six months as well as other possible penalties (including wearing a distinctive clothing identifying the offender as a convicted drunk driver), was not "constitutionally serious." Thus, the sixth amendment granted no right to a jury trial for a charge under the Nevada DUI statute. Blanton, 489 U.S. at 545.

In United States v. Nachtigal, ___ U.S. ___, 113 S. Ct. 1072, 1073 (1993), the Court reiterated that "offenses for which the maximum period of incarceration is six months or less are presumptively 'petty.'" Id. (citing Blanton, 489 U.S. at 543). "A defendant can overcome this presumption, and become entitled to a jury trial, only by showing that the additional mix of penalties, viewed together

with the maximum prison term, are so severe that the legislature clearly determined that the offense is a 'serious' one." Id. In Nachtigal, the defendant was charged under a federal DUI regulation with operating a motor vehicle in Yosemite National Park while under the influence of alcohol. The Court held that the charge, with a maximum penalty of sixth months imprisonment, a maximum $5,000 fine, a maximum five year term of probation, and a host of additional penalties[10] was not

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[10] The Court in Nachtigal noted:

> There are 21 discretionary conditions which the sentencing court may impose upon a defendant. Under 18 U.S.C. § 3563(b), a court may require, among other things, that the defendant (1) pay restitution; (2) take part in a drug and alcohol dependency program offered by an institution, and if necessary, reside at the institution; (3) remain in the custody of the Bureau of Prisons during the nights and weekends for a period not exceeding the term of imprisonment; (4) reside at or participate in a program of community correctional facility for all or part of the probationary term; (5) remain at his place of residence during nonworking hours, and, if necessary, this condition may be monitored by telephonic or electronic devices. §§ 3563(b)(3), (b)(10), (b)(11), (b)(12), (b)(20).

Nachtigal, ___ U.S. at ___ n., 113 S. Ct. at 1074 n. *.

consitutionally serious.

Here, the maximum authorized term of imprisonment for a first-offense DUI under HRS § 291-4, as amended, is five days -- well below the six-month threshold enunciated in Blanton. A first-offense DUI is, therefore, presumptively "petty" for purposes of federal constitutional analysis.

The additional possible mix of penalities for a first-offense DUI conviction under Hawai'i law includes: (1) minimum fourteen-hour attendance at alcohol rehabilitation classes; (2) a ninety-day driver's license suspension; (3) community service; (4) a fine between $150 and $1,000; (5) compliance with HRS § 287-20 (Supp. 1992) (requiring proof of financial responsibility before reapplying for driver's license); and (6) collateral consequences such as payment of costs for most of the penalties. Nachtigal clearly suggests that Hawai'i's authorized maximum penalties and the list of additional mix for a first-offense

DUI do not overcome the federal presumption that such offense is petty. See Nachtigal, ___ U.S. at ___, 113 S. Ct. at 1074 ("it is a rare case where 'a legislature packs an offense it deems "serious" with onerous penalties that nonetheless do not puncture the 6-month incarceration line'" (citing Blanton, 489 U.S. at 543)).

However, appellants argue that an increased insurance rate based on a DUI conviction is a severe penalty, which adds to the "mix" and results in the offense being constitutionally serious. Indeed, the trial court in this case found that automobile insurance rates increase dramatically for a person convicted of DUI.[11] Despite such determination, we do not consider increased rates for private insurance companies to be a statutory "penalty" for violating HRS

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[11] For example, the trial court noted that according to a 1990 study, the average rate for a Toyota rises from $1,086 a year, for a driver with a clear abstract, to $7,913 a year, with a DUI conviction; for a BMW, the rate rises from $1,798 to $14,413 per year.

§ 291-4. See Blanton, 489 U.S. at 543 n.8 ("In performing this analysis, only penalties resulting from state action, e.g., those mandated by statute or regulation, should be considered.") Although appellants cite to HRS chapter 287's provisions requiring proof of financial responsibility, insurance companies would likely raise insurance rates regardless of whether a driver convicted of DUI is required to comply with chapter 287 because of the actuarially increased risk that such a driver poses.[12]

Accordingly, we hold that there is not right to a jury trial under the United States Constitution for a first-offense DUI under HRS § 291-4, as amended by Act 128.

2. State Constitutional Analysis

The Constitution of the State of Hawai'i provides, in pertinent part, that "[i]n all

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[12] This likelihood is bolstered by the trial court's finding that "insurance companies could lower rates for those convicted and absorb the cost[,]" regardless of compliance with HRS chapter 287.

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the district wherein the crime shall have been committed[.]" Haw. Const. art I, § 14. "Although the right to a jury trial is of great importance, we have also recognized that it is not an absolute right. Specifically, we have held that a defendant charged with a petty crime does not have a constitutional right to a jury trial." State v. Wilson, 75 Haw. 68, 73, 856 P.2d 1240, 1243 (citations omitted), reconsideration denied, ___ Haw. ___, 861 P.2d 735 (1993). Thus, the issue is whether a first-offense DUI, as reconfigured by Act 128, is a petty or serious crime under the Hawai'i Constitution.

We analyze three factors to determine whether an offense is constitutionally petty or serious: "(1) treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty." Wilson, 75 Haw. at 74, 856 P.2d at 1244 (citing O'Brien, 68

Haw. at 41-43, 704 P.2d at 885-87).

Under the first factor, we consider the "traditional treatment" of the offense and "whether [the] offense was indictable at common law, triable at common law by jury, or tried summarily without a jury." Id.

Under the second factor, we consider whether an offense "affects the public at large, reflects moral delinquency, or carries a sufficient disgrace to require labelling the offense as constitutionally serious." Id. In applying the second factor, the legislature's perception of an offense, as reflected by its statements in legislative history, often provides a strong indication of society's view of the gravity of an offense. Id. at 75, 856 P.2d at 1245.

Finally, the third factor "focuses on the authorized penalty for the offense." Id. at 76, 856 P.2d at 1245. We consider not only the maximum possible prison term, but also the possible additional statutory "mix of

penalties" that may attach to the offense. Id.

In Wilson, we held that a charge under HRS § 291-4.5 (1985) (driving after license suspended for DUI) is constitutionally petty and, therefore, a defendant so charged is not entitled to a jury trial. Id. at 78, 856 P.2d at 1246. Significantly, in Wilson, we reviewed our past application of the three-part test in O'Brien and Jordan to the underlying DUI statute, HRS § 291-4.

The test we applied in Wilson arose out of O'Brien. In O'Brien, we analyzed the 1983 version of HRS § 291-4 and interpreted the offense of DUI to be constitutionally serious, granting a right to a jury trial. In applying the three-part test in O'Brien, this court analogized DUI to common law reckless driving (an indictable offense requiring the right to a jury trial), interpreted legislative pronouncements in assessing the gravity of the

offense,[13] and considered the identical maximum prison term of 180 days authorized in 1985 for first and repeat DUI offenders as well as the potential mix of penalties.[14] O'Brien, 68 Haw. at 42-43, 704 P.2d at 886. Significantly, the defendant in O'Brien was not

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[13] In O'Brien, we stated:

> Turning to an assessment of the gravity of DUI, we note first the legislative pronouncements of the statutes governing such charges. The legislature's commentary reflects its unequivocal acknowledgement that drunk driving presents a social problem of vast and potentially devastating proportions. . . . [T]he legislature noted:
>
> > It is frightening to realize that one of every two Americans will be involved in an alcohol-related auto crash in his or her lifetime. In our own state the dimensions of the drunk-driving problem can be highlighted by recent statistics. IN 1981, almost two-thirds of Hawai'i's traffic deaths were alcohol-related; drinking drivers involved in all accident here number 2,465 in 1980.
> >
> > The problem is already of major proportions, yet it is growing, and will continue to increase unless and until this Legislature provides meaningful sanctions that will deter drunken driving.

O'Brien, 68 Haw. at 42-43, 704 P.2d at 886 (citation omitted).

[14] As previously noted, the mix of penalties under the 1983 version of HRS § 291-4 was identical to the mix under the 1989 amendments, except that the community service for a second offense was changed from "not less than ten days" to "eighty hours."

a first-time DUI offender. Id. at 40, 704 P. 2d at 885. The holding in O'Brien applied to DUI as a whole and did not distinguish between first and repeat offenders. In concluding that the offense of DUI was serious, we commented:

> Were we faced with a situation where a first DUI offense was punishable, for example, by imprisonment for no more than five days, a second conviction by imprisonment for no more than ten days and a third, by imprisonment for no longer than one month, we would perhaps be persuaded by State's position that DUI is not a serious offense in the constitutional sense.

Id. at 44, 704 P.2d at 887 (emphasis added). By suggesting the maximum prison terms for first and repeat DUI offenses that would perhaps persuade the court that DUI is not constitutionally serious, it is apparent that this court placed primary emphasis on the imprisonment aspect of the three-part test, as did the United States Supreme Court in Blanton, wherein the Court stated:

> Primary emphasis, however, must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may

> engender "a significant infringement of personal freedom," but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an "intrinsically different" form of punishment, it is the most powerful indication of whether an offense is "serious."

Blanton, 489 U.S. 542 (citations omitted) (emphasis added).

The Legislature appears to have specifically considered the comment from O'Brien regarding a maximum imprisonment term of five days for a first-offense DUI when it promulgated Act 128, declaring a first offense to be petty. We note that because Act 128 authorizes a maximum prison term of sixty to 180 days for a second- and third-offense DUI, respectively, the legislature arguably rejected this court's suggestion of prison terms that would have included such repeat offenses in the petty category.

In Jordan, we applied the three-part O'Brien test to the 1990 amended version of HRS § 291-4 (the version immediately prior to Act

128). In assessing the gravity of both a first- and second-offense DUI, we interpreted the legislative history of the 1990 amendment, which "indicate[d] [that] the legislature continue[d] to regard DUI as a very serious crime and social problem" despite reductions in the maximum prison sentence to thirty days for a first offense and to sixty days for a second offense. Jordan, 72 Haw. at 601, 825 P.2d at 1068. We also noted that the legislature had added the ignition interlock penalty provision for a first-time offense. Id. at 599, 825 P.2d at 1067. Therefore, in Jordan, we continued to interpret all levels of offenses under HRS § 291-4 as constitutionally serious. Jordan effectively turned, in part, on our interpretation of the legislature's perception of a first-time DUI offense.

Following Act 128's enactment in 1993, we decided Wilson. As noted previously, in Wilson, we reviewed a charge related to DUI, that is, driving after license suspended for

DUI under HRS § 291-4.5. We based our analysis of the section 291-4.5 charge, in part, on Act 128. We reasoned as follows:

> After reviewing our opinion in Jordan, the legislature, in 1993, decisively spoke and deemed our view of its perception of the seriousness of first time DUI offenses to be in error.
>
> . . . .
>
> Irrefutably, the legislature regards first time DUI offenses as constitutionally "petty" offenses, thereby characterizing the potential mix of penalties faced by a first time DUI offender constitutionally "petty" as well. Moreover, it is now clear that the legislature has always viewed first time DUI offenses as petty.

Wilson, 75 Haw. at 77-78, 856 P.2d at 1245 (emphasis added). We relied on the legislature's specific and unambiguous declaration that:

> [t]he purpose of [Act 128] is to reduce the penalties for first time offenders so that there can be no question that, as to first time offenders, the offense is a "petty offense" in the constitutional sense, to which no right to jury trial attaches. The legislature finds that those offenders who are convicted repeatedly of driving under the influence of intoxicating liquor represent a serious social problem. . . .First time offenders, however,

represent less of a threat to society, as most will respond to corrective action.

Act 128, 1993 Haw. Sess. Laws at 179 (emphasis added).[15] This unequivocal legislative statement provides a strong indication of society's view of the gravity of first offense DUI.

Consequently, we held in Wilson that a

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[15] The House Committee on Judiciary, reporting on House Bill No. 747, House Draft 1, which was eventually enacted as Act 128, stated:

> Your Committee notes that in its amended form, this bill specifically sets forth the Legislature's view that it regards the repeat offenders as the serious social problem, for it is the repeat offenders who have demonstrated an unwillingness to modify their behavior. The amended bill sets forth the Legislative finding that the first-time offender is of lesser concern because most first-time offenders will respond to treatment, will modify their behavior, and will cease to be a hazard to the general public. Repeat offenders, on the other hand, require firmer action and represent a serious social problem[,] for by their actions[,] they demonstrate that they are less likely to reform their behavior and hence represent a continuing danger to other motorists, passengers, pedestrians[,] and the public in general.

Hse. Stand. Comm. Rep. No. 600, in 1993 House Journal, at 1213; see also Sen. Conf. Comm. Rep. No. 105, in 1993 Senate Journal, at 785-86 (containing language identical to House Judiciary Committee's Report No. 600; Sen. Stand. Comm. Rep. No. 1227, in 1993 Senate Journal, at 1213 ("repeat offenders . . . pose the greatest risk to the community and public safety").

charge under HRS § 291-4.5 is not constitutionally serious and did not entail the right to a jury trial because "if the legislature had always intended the potential mix of penalties faced by a first time DUI offender to be constitutionally 'petty,' then by promulgating similar penalties for a violation of HRS § 291-4.5, it also intended HRS § 291-4.5 to be constitutionally 'petty.'" Id. at 78, 856 P.2d at 1246.

In Wilson, we relied on the legislature's perception of the gravity of the offense as well as the potential mix of penalties and indicated in dictum that a first-offense DUI charge under HRS § 291-4, as amended by Act 128, is constitutionally petty. By noting that "it is now clear that the legislature has always viewed first time DUI offenses as petty," id. at 78, 856 P.2d 1245, we called into question Jordan and O'Brien. Although, we implied in Wilson that Jordan and O'Brien were no longer good law in regard to their

application to first-time DUI offenses, we did not explicitly limit or overrule, in whole or in part, the holdings of either case. Before doing so today, however, we deem it necessary to clarify the dictum in Wilson, beginning with the fundamental tenet -- Above all is the constitution.

"American legislatures must adhere to the provisions of a written constitution. . . . Our ultimate authority is the Constotition; and the courts, not the legislature, are the ultimate interpreters of the Constitution." State v. Shak, 51 Haw. 612, 617, 466 P.2d 422, 425, cert. denied, 400 U.S. 930 (1970); see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (laws regunant to the Constitution are void). "It is [the] concept of the Constitution as law, and the judiciary as the institution with responsibility to interpret the law, which remains the cornerstone of judicial review today." R. Rotunda & J. Nowak, Treatise on Constitutional Law § 1.3., at 42

(2d ed. 1992). These same principles of judicial review apply when determining whether an offense is constitutionally petty or serious. When addressing the constitutionality of a statute, we have cautioned that

> "whether the legislation under review is wise or unwise is a matter with which we have nothing to do. Whether it . . . work[s] well or work[s] ill presents a question entirely irrelevant to the issue. The only legitimate inquiry we can make is whether it is constitutional. If it is not, its virtues, if it have anym cannot save it; if it is, its faults cannot be invoked to accomplish its destruction. If the provisions of the Constitution be not upheld when they pinch as well as when they comfort, they may as well be abandoned."

Baehr v. Lewin, 74 Haw. 530, 582-83, 852 P.2d 44, 68 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 483 (1934) (Sutherland, J., dissenting), reconsideration and clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993).

In Duncan v. Louisiana, 391 U.S. 145, reh'g denied, 392 U.S. 947 (1968), the United States Supreme Court wrote:

> the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial, or . . . themselves face the questions in the first instance.

Id. at 160; see also Frank v. United States, 395 U.S. 147, 156 ("We cannot . . . place unlimited reliance on legislative definitions and 'existing . . . pratices in the Nation' and thereby allow Congress and the States to rewrite the [s]ixth [a]mendment [to] the Constitution by simply terming 'petty' any offense regardless of the underlying sentence." (Warren, C.J., dissenting)), reh'g denied, 396 U.S. 869 (1969). Our task in interpreting whether legislative acts pass constitutional muster is aided by legislative statements which reflect existing public policies relied upon in

the enactment of laws.[16] Ultimately, however, our judgment must be independent.

With these principles in mind, we examine and clarify Wilson and its interpretation of O'Brien and Jordan. Initially, we note that the legislative history did not specifically distinguish between the "seriousness" of first and repeat DUI offenses. On the contrary, the legislative history prior to Act 128 implicitly perceived first and repeat DUI offenses to be substantially equal in seriousness.

As previously noted, in O'Brien, this court relied heavily on the legislature's perception of the gavity of the general nature of DUI as evidenced by its pronouncements culminating in the conclusion that DUI "is one of the State's most serious and tragic problems." O'Brien, 68 Haw. at 43, 704 P.2d at 886. Additionally, we

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[16] See Blanton, 538 U.S. at 541-42 ("[the legislature] is far better equipped to perform the task [of assessing the public's perception of whether a crime is petty], and is likewise more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect" (citation omitted) (internal brackets and quotation marks omitted)).

believed that by providing a maximum imprisonment term of 180 days for first and repeat offenses, the legislature intended no distinction between such offenses in terms of their seriousness. Therefore, although in Wilson we interpreted the history of Act 128 in 1993 as indicating that the legislature "always viewed first time DUI offenses as petty," we are not compelled to overrule O'Brien. Merely because a legislature by hindsight indicates that an offense should be viewed as petty does not make it do. In short, we must apply all three factors of the O'Brien/Wilson test in determining whether an offense is petty or serious.

In Jordan, this court dealt with reserved question presenting the issue of a jury trial for both first- and second-time DUI offenders and held that such offenderes have a right to a jury trial. Upon applying the O'Brien test in Jordan, we stated:

> In light of O'Brien, we are unwilling to draw such a distinction

> where the only downgrading of the seriousness of the crime in the statute is a "clarification"[17] by which the maximum jail sentences for first and second offenders is 30 and 60 days, respectively, instead of six months, but where an additional penalty has been added, and where the legislative history of Act 188 of the 1990 Session Laws, as well as Act 1 of the 1991 Special Session, all indicate the legislature continues to regard [DUI] as a very serious crime and social problem.

Jordan, 72, Haw. at 601, 825 P.2d at 1068.

The legisaltive history of Act 128 indicates that the legislature was specifcally responding to Jordan's interpretation of the legislature's view of the gravity of a first-offense DUI and explained its perception that "[f]irst time offenders . . . represent less of a threat to society, as most will respond to

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[17] As previously stated, we noted in O'Brien that HRS § 291-4, as then worded, imposed a six-month maximum penalty for a third offense and assumed that it also imposed the same maximum for a first and second DUI offense. See supra note 5. We explained in Jordan that, based on the legislative history, the addition of the maximum jail term for a first- and second-offense DUI, which the legislature referred to as a "clarification," was in response to this court's interpretation that the six month maximum penalty for a third offense applied to all levels of DUI offenses. See Jordan, 72 Haw. at 600, 825 P.2d at 1067.

corrective action." Act 128, 1993 Haw. Sess. Laws at 179. Thus, we acknowledged in Wilson this court's erroneous interpretation, in Jordan, of the legislative perception regarding first time DUI offenders, thereby implicitly overruling Jordan. To the extent that the court in Jordan interpreted first-offense DUI to be constitutionally serious, we explicitly overrule it today.

Despite our reasoning in Wilson, appellants argue that first-offense DUI remains constitutionally serious. They contend that a reduction from a thirty- to five-day maximum jail sentence is insignificant, and that the additional maximum "mix of penalties" has not otherwise changed from that in Jordan and O'Brien (other than eliminating the unimplemented ignition interlock provision). Essentially, they argue that the reasoning in Jordan and O'Brien compels the finding that DUI per se is serious. They assert that the current mix of penalties indicates that the

people of Hawai'i view DUI as a grave and serious offense. However, as analyzed previously in this opinion and in Wilson, the legislature clearly perceives the nature of the gravity and seriousness of first-offense DUI to be petty and repeat offenses to be serious. Furthermore, Act 128 supports the legislature's perception that first-offense DUI is petty by (1) amending first-offense DUI so as to provide a maximum prison term of only five days, (2) eliminating the possible penalty of court-ordered installation of an ignition interlock device in a first-time DUI offender's vehicle, and (3) leaving untouched additional statutory penalties that do not approach the seriousness of imprisonment.

In support of their position that a first-offense DUI is constitutionally serious, appellants cite Dow v. Circuit Court, 995 F.2d 922 (9th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1051 (1994), an opinion arising out of Hawai'i, which holds that a person

convicted of DUI and sentenced to mandatory attendance at an alcohol rehabilitation program was "in custody" for purposes of habeas corpus review of the conviction under 28 U.S.C. § 2254(a) (1966). Nevertheless, whether a conviction is subject to review on habeas corpus grounds is not a factor in determining the constitutional seriousness of an offense. Moreover, whether a person is "in custody" is irrelevant to determining the right to a jury trial. Indeed, "[t]he kind of custody that will suffice [for habeas corpus purposes] is judged by a very liberal standard, and any restraint on a petitioner's liberty because of [a] conviction that is over and above what the state imposes on the public generally will suffice." 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, § 4262, at 305 (1988) (citing Jones v. Cunningham, 371 U.S. 236 (1963) (a prisoner free on parole is in custody and may seek habeas corpus relief)) (emphasis added). Thus, appellants' reliance

on Dow is misplaced.

Appellants also argue that the social stigma attached to a DUI conviction and its collateral consequences, such as dramatic the legislature clearly perceives the nature of the gravity and seriousness of first-offense DUI to be petty and repeat offenses to be serious. Furthermore, Act 128 supports the legislature's perception that first-offense DUI is petty by (1) amending first-offense DUI so as to provide a maximum prison term of only five days, (2) eliminating the possible penalty of court-ordered installation of an ignition interlock device in a first-time DUI offender's vehicle, and (3) leaving untouched additional statutory penalties that do not approach the seriousness of imprisonment.

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state imposes on the public generally will suffice." 17A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, § 4262, at 305 (1988) (citing Jones v. Cunningham, 371 U.S. 236 (1963) (a prisoner free on parole is in custody and may seek habeas corpus relief)) (emphasis added). Thus, appellants' reliance on Dow is misplaced.

Appellants also argue that the social stigma attached to a DUI conviction and its collateral consequences, such as dramatic increases in car insurance premiums and mandated compliance with HRS § 287-20 (proof of financial responsibility) in order to drive, make the offense constitutionally serious. But, consistent with our earlier analysis of the federal constitution, increased insurance rates by private insurers are not considered penalties because neither chapter 287 nor any other statutory scheme mandates that insurance companies increase rates for drivers convicted

of DUI. See Blanton, 489 U. S. at 543 n. 8.

Appellants also cite federal and state cases from other jurisdictions holding that there is a right to a jury trial for DUI charges. See, e.g., Opinion of the Justices (DWI Jury Trials), 135 N.H. 538, 608 A.2d 202 (1992) (six-month prison term for second DUI offense without right to jury trial violates New Hampshire constitution); United States v. Craner, 652 F.2d 23 (9th Cir. 1981) (DUI on Yosemite National Park with maximum penalty of six months imprisonment and $500 fine is a serious offense providing a right to a jury trial); United States v.

Woods, 450 F. Supp. 1335 (D. Md. 1978) (DUI on a national park with maxImum six months imprisonment and $500 fine is a serious offense); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970) (analyzing a DUI statute with a maximum penalty of $600 and sixty days imprisonment and holding that a jury trial is provided for any criminal offense, regardless of potential prison sentence, under the Alaska Constitution). These cases review DUI statutes with constitutional requirements, legislative histories, and penalties different than Hawai'i's. Furthermore, the cited federal cases are pre-Blanton, and therefore, have been implicitly overruled.

Appellants also claim that the legislature's stated intent in Act 128 is "constitutionally suspect" because it conflicts with the intent set forth in Act

188, 1990 Haw. Sess. Laws 399 [18] The preamble to Act 188 explained that "the legislature finds that driving under the influence of alcohol poses a very real and serious danger to the safety and welfare of the people of this State and requires stronger measures to ensure that people who drink do not drive and that those who do are

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[18] Act 188 promulgated the Administrative Driver's-License Revocation Law, HRS, chapter 286. See generally Kernan v. Tanaka, 75 Haw. 1, 856 P.2d 1207 (1993) (describing program for administrative procedures to revoke driver's license for DUI offenses and holding that the program is constitutional), cert denied, ___ U.S. ___, 114 S. Ct. 1070 (1994). Act 188 also amended HRS §§ 291-4, 291-4.5, and 321-161. Act 188, 1990 Haw. Sess. Laws at 399-413.

taken off the road promptly." Act 188, 1990 Haw. Sess. Laws at 399. We are not persuaded by appellants' reference to Act 188 because the intent set forth in Act 128, at issue here, is clear. The 1993 Legislature specifically passed Act 128 in response to Jordan and the overwhelming backlog of cases burdening the judiciary. Moreover, Act 188 has no bearing on the legislative mandate expressed in Act 128, nor does it distinguish the "real and serious dangers" posed by repeat offenders as does Act 128.

In respcnse to appellants' arguments, the prosecution points out that HRS § 806-60 (1985) specifically defines "serious crime" in a jury trial context to mean "any crime for which the defendant may be imprisoned for six months or more." HRS § 806-60. Given the statutory definition, the prosecution argues that there is no right to a jury trial under HRS § 291-4 because the maximum term of imprisonment is six months regardless of the

number of repeat offenses (and that therefore Jordan and O'Brien were wrongly decided). However, the definition does not apply in the current context.

HRS § 806-60 provides:

> **Jury of twelve required.** Any defendant charged with a serious crime shall have the right to trial by a jury of twelve members. "Serious crime" means any crime for which the defendant may be imprisoned for six months or more.

Section 806-60 was promulgated "to conform the Hawaii Revised Statutes to the Hawaii State Constitution as amended by the constitutional convention of 1978." Act 89, 1979 Haw. Sess. Laws 173. Thus, section 806 codifies article I, § 14, of the Hawai'i Constitution. Article I, § 14 states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury .... Juries, where the crime charged is serious, shall consist of twelve persons.

(Emphasis added). The emphasized provision was added during the 1978 Constitutional

Convention in response to Williams v. Florida, 399 U.S. 78 (1970) (upholding a Florida law providing for a six-person jury in a non-capital criminal case).[19] See Committee of the Whole Debates, reprinted in 2 Proceedings of the Constitutional Convention of Hawai'i of 1978 [hereinafter Proceedings] at 679-84.

When adding the new provision, the constitutional convention delegates were not addressing the serious versus petty distinction at issue in this case. They were merely focusing on the number of members on a jury; the right to a jury trial itself was presumed to exist. For example, when Delegate Penebacker introduced the relevant motion, he stated:

> The concept of the 12-person jury is an integral part of our judicial

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[19] Williams overruled Thompson v. Utah, 170 U.S. 343 (1898), wherein the Supreme Court held that the sixth amendment requires a jury of twelve persons and is applicable to the states by the fourteenth amendment.

> system.... Reducing the number of jurors in serious criminal cases will have an adverse effect on the purpose for which a jury is required by our judicial system.... The fewer the jurors, the more likely that these cases will be tried on the streets and the media. We must protect against this. The 12-Person jury in serious criminal cases would do much to insure that minority opinions are heard and that the detrimental effects of community outrage are tempered by calm deliberation.

2 Proceedings at 679-80 (emphasis added).

Delegate DiBianco echoed the rationale:

> Some states have had occasion in very recent years . . . to change the number [of jurorsl. . . . I don't want to see us run the risk of having that kind of thing happen in Hawaii. . . . Certainly, at least for serious cases, we should ~o with the 12-1Person] and we should have the protection in the Constitution. . . . [W]hen you're concerned with a serious felony, I think every defendant should feel safe in the knowledge that his Constitution mandates that he will have a 12-[person] jury, and neither our legislature, our judges, nor anybody else can tamper with it.

Id. at 682. There was no mention of the serious/petty distinction that would determine the right to a jury trial. On the

contrary, jury trials for a class of "non-serious" crimes were contemplated, but only in the context of fewer members on the jury. As Delegate Penebacker explained:

> The absolute right to a 12-person jury is unnecessary in some situations because the potential penalty may [not] be severe or create a great likelihood that justice may be miscarried. It is important to allow for economic and efficiency considerations in these situations since they might not affect a fair or impartial trial. Thus, a smaller jury of lesser members might be more just.

Id. at 680 (emphasis added) . In further support of our conclusion that "serious," as used in HRS § 806-60 and in article I, § 14, does not refer to the serious/petty distinction at issue in the instant case, we note that the language of article I, § 14 essentially tracks the language of the sixth amendment of the United States Constitution but that article I, § 14 additionally provides that "[j]uries, where the crime charged is serious, shall consist of twelve persons." (Emphasis added.) Despite the

absence of any reference to "serious" crimes under the sixth amendment, the serious/petty distinction, in the context of the right to jury trial, exists because of the practice at common law.

> So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting fram the availability of speedy and inexpensive nonjury adjudications.

Duncan v. Lousiana, 391 U.S. at 160 (emphasis added).

In sum, applying the three-part test from Wilson, we now hold that a charge of first-offense DUI under HRS § 291-4, as amended by ACt 128, is constitutionally petty. The distinction between first and repeat offenders in Act 128's legislative

history is critical, and the maximum mix of statutory penalties does not compel a different result.[20] Being a constitutionally petty offense, no right to a jury trial attaches to first-offense DUI. Therefore, we now specifically limit O'Brien to its facts and Jordan to repeat DUI offenses; to the extent the holding of Jordan grants the right to a jury trial for first-offense DUI, we specifically overrule it. Given the current legislative view of the seriousness of repeat offenses and the mix of potential penalties, however, repeat offenses remain constitutionally serious. Accordingly, we answer the first reserved question in the affirmative.

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[20] We note that the first prong of the test -- treatment of the offense at common law -- is inapplicable in analyzing first offense DUI. To the extent O'Brien relied on an analogy to common law reckless driving, we no longer deem the analogy to be controlling. Cf. United States v. Woods, 450 F. Supp. at 1345 ("The Court is unaware whether [DUI] was indictable at comman law. . . . Nevertheless, the Court believes that this inquiry, even if it could be pursued to an accurate conclusion, is irrelevant to the instant action [whether there is a right to a jury trial for DUI]").

B. The Second Reserved Question

> If the amendments to the sentencing provisions of HRS [§] 291-4 provided in Act 128, Session Laws of Hawai'i, Regular Session of 1993, effective May 21, 1993, do eliminate the right to jury trial, whether the deprivation of such a right may be applied retrospectively to alleged offenses occurring prior to the enactment of the Act.

HRS § 1-3 (1985) provides that "[n]o law has any retrospective operation, unless otherwise expressed or obviously intended." (Emphasis added.) As noted previously, section 5 of Act 128 provides that it takes effect upon approval, "provided that [the reduced penalties] shall be retroactive for all pending first-offense cases for [DUI]." 1993 Haw. Sess. Laws at 181. Therefore, for purposes of HRS § 1-3, HRS § 291-4, as amended by Act 128, clearly applies retroactively to pending cases.

Appellants, however, challenge the constitutionality of the retroactive application of ERS § 291-4, as amended. Appellants argue that to retroactively apply

Act 128 would deprive them of a vested fundamental right to a jury trial in violation of the ex post facto clause of the United States Constitution[21] and violates due process. The prosecution, on the other hand, argues that because Act 128 transforms a first- offense DUI under HRS § 291-4 into a constitutionally petty offense, the appellants' argument against retroactive application is frivolous. The prosecution essentially argues that no right has been taken away; rather, the crime is different because the penalties under the amended § 291-4 are lesser, and therefore, the corresponding right is different.

The burden is on the appellants to show that Act 128 is a plain, clear, manifest, and unmistakable violation of the ex post facto clause of the United States Constitution and

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[21] There is no ex Fost facto clause in the Hawai'i Constitution and, thus, appellants' arguments for a broader reading on state law grounds are misplaced.

due process. We therefore address each alleged violation in turn to determine whether appellants have met their burden.

1. The *Ex Post Facto* Clause

The *ex post facto* clause of the United States Constitution provides that "[n]o state shall . . . pass any . . . ex post facto law." U.S. Const. art. I, § 10, cl. 1. The clause prohibits states from enacting retrospective penal legislation.

In Collins v. Youngblood, 497 U.S. 37 (1990), the United States Supreme Court was presented with the question "whether the application of a Texas statute, which was passed after respondent's crime and which allowed the reformation of an improper jury verdict in respondent's case, violate[d] the Ex Post Facto Clause of Art. I, § 10." [22]

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[22] Respondent was convicted of aggravated sexual abuse, sentenced to life imprisonment, and fined $10,000. In his subsequent state petition for a writ of habeas corpus, Respondent argued that the Texas Code of Criminal Procedure did not authorize both a fine and a term of imprisonment for his offense, and thus, he was entitled to a new trial. Before the writ was decided, a new Texas statute was passed allowing an appellate court to reform

Id. at 39. In summarizing the meaning of the ex post facto clause, the Court stated:

> "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute [(1)] which punishes as a crime an act previously committed, which was innocent when done[, (2)] which makes more burdensome the punishment for a crime, after its commission, or [(3)] which deprives one charged with la] crime of any defense available according to law at the time when the act was committed, is probibited as ex post facto."

Id. at 42 (quoting Beazell v. Ohio, 269 U.S.

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an improper verdict assessing a punishment not authorized by law. Relying on the new statute, the Court of Criminal Appeals, which has the exclusive power under Texas law to grant writs of habeas corpus, reformed the verdict by ordering deletion of the $10,000 fine and denied his request for a new trial.

Arguing that retroactive application of the new Texas statute violated the *ex post facto* clause of the United States Constitution, Respondent filed a federal writ of habeas corpus, which was denied by the district court but entertained by the court of appeals. The court of appeals, relying on Thompson v. Utah, 170 U.S. 343 (1898), reversed, holding that retroactive procedural statutes violate the ex post facto clause unless they "leave untouched all of the substantial protections with which existing law surrounds the person accused of the crime." Id. at 352. The court held that Respondent's right to a new trial was such a "substantial protection." The United States Supreme Court granted certiorari to review the granting of the writ.

167, 169-70 (1925)). "The Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." Id. (emphasis added); see also State v. Von Geldern, 64 Haw. 210, 212, 638 P.2d 319, 321 (1981) ("no new punitive measure may be applied to a crime already consummated. . . . Such legislation would be [an] ex post facto law").

Act 128 passes this constitutional test. The Act reduces, not increases, possible punishment. It reduces the maximum sentence from thirty to five days and eliminates a provision for an ignition interlock system. In Von Geldern, this court held that an amendment to a sentencing statute (HRS § 707-606.5), which allowed a judge to consider mitigating circumstances and possibly reduce a mandatory minimum

sentence, applied retrospectively because the provisions were ameliorative and remedial. Id. at 216, 638 P.2d at 324. The Von Geldern court remanded for resentencing, ruling that because the ameliorative provisions were not "detrimental nor materially disadvantageous," the law was not ex post facto. Id. at 213, 638 P.2d at 322. Thus, retroactive application of HRS § 291-4, as amended by Act 128, is clearly not prohibited.

Appellants, however, relying on Thompson v. Utah, 170 U.S. 343 (1898), argue that "the prohibition against [e]x [p]ost [f]acto legislation should bar the divestiture of the right to trial by jury." The United States Supreme Court, in Thompson, held that a Utah law, reducing a criminal jury size from twelve to eight, deprived a defendant of "a substantial right involved in his liberty," thus violating the ex post facto clause. Collins, 497 U.S. at 47 (quoting Thompson, 170 U.S. at 352). Thompson

and other Supreme Court cases have held that procedural changes could constitute ex post facto violations if they "affect matters of substance," deprive defendants of "substantial protections with which the existing law surrounds the person accused of crime," or arbitratily infringed upon "substantial personal rights." Collins, 497 U.S. at 45 (citations omitted). The Supreme Court, in Collins, acknowledged that "this language . . . has imported confusion into the interpretation of the Ex Post Facto Clause. " Id. at 45. The Court, therefore, specifically overruled Thompson, commnenting as follows:

> The right to jury trial provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with definition of crimes, defenses. or punishments, which is the concern of the Ex Post Facto Clause. To the extent that Thompson v. Utah rested on the Ex Post Facto Clause and not the Sixth Amendment, we overrule it.

Id. at 51-52 (footnote omitted) (emphasis

added).

Here, the retroactive application of Act 128, in the context of an ex post facto analysis, affects only the procedural determination of whether appellants will be tried by a judge or jury; their right to affair and impartial trial has not been compromised or divested in any way. We fail to see any substantial prejudice which would result to appellants from the retrospective application of a non-jury trial. Thus, we conclude that retrospectively applying Act 128 does not violate the ex post facto clause of the United States Constitution.

2. **Due Process**

Appellants next argue that depriving them of a vested substantive and fundamental right violates due process. Under the rubric of "due process," appellants blend the arguments that changes to substantive rights may not be applied retroactively and retroactive application is fundamentally

unfair.

a. Retroactive Application of Changes to Substantive Rights

Appellants cite cases from other jurisdictions holding that the right to a jury trial is a substantive right. See State v. Chapman, 15 Ran. App. 2d 643, 814 P.2d 449 (1991); and Bertolino v. Industrial Comm'n of Ohio, 43 Ohio St. 3d 44, 538 N.E.2d 1040, reh'g denied, 44 Ohio St. 3d 706, 541 N.E.2d 626 (1989). However, unlike the cases before us, we note that both cases dealt with statutory (not constitutional) grants of jury trials.

In Chapman, the defendant faced a speeding charge. Although a jury trial for a traffic offense was not guaranteed by the Kansas Constitution, a state statute granted the defendant that right. Chapman, 15 Kan. App. 2d at 644, 814 P.2d at 450. While the action was pending, the legislature amended the statute to eliminate the jury trial right. The Ransas appellate court

held:

> We believe [defendant] had a substantive right to a jury trial under a previously existing state law. Although this right could be modified, the repeal of the law which conferred the right should not have a retroactive effect so as to deprive [defendant] of the Jury trial to which he was entitled.
>
> It is difficult to conceive of a more fundamental right than an accused's right to a jury trial. In the absence of clear statutory language to the contrary, we believe the legislature intended the statutory changes, discussed here, to operate prospectively only, and not retroactively.

Id. at 646-47, 814 P.2d at 451 (emphasis added). In the instant case, however, there is "clear statutory language to the contrary." As noted previously, Act 128 provides that "[t]he amended penalty provisions for first time offenders shall be retroactive for all pending first time offense cases for [DUI]." 1993 Haw. Sess. Laws at 180.

Similarly, in Bertolino, a party had a

statutory right to have a jury determine damages for an intentional tort. Bertolino, 43 Ohio St. 3d at 44, 538 N.E.2d at 1040. While appellant's case was pending, the legislature amended the statute, eliminating the jury trial right. The Ohio Supreme Court held that because the right to a jury trial is substantive, it could be applied prospectively only (regardless of legislative intent). Bertolino, 43 Ohio. St. 3d at 46, 538 N.E.2d at 1042. However, the court in Bertolino relied on a ban against retroactivity grounded in Ohio's Constitution itself. See Ohio Const. art 2, § 28 ("The general assembly shall have no power to pass retroactive laws[.]"). Hawai'i's Constitution has no such provision. Rather, as noted previously, Hawai'i law provides, by statute, that "In]o law has any retrospective operation, unless otherwise expressed or obviously intended." HRS § 1-3 (emphasis added). The intent of the legislature that

HRS § 291-4, as amended, have retroactive application is clearly set forth in Act 128.[23]

b. Fundamental Fairness of Retroactive Application

Appellants also argue that retroactive application of court decisions is fundamentally unfair, citing State v. Ikezawa, 75 Haw. 210, 857 P.2d 593 (1993). Ikezawa was originally charged with third-degree assault, which was dismissed without prejudice. Fourteen months later, based on the same incident, Ikezawa was charged with second degree assault. Prior to trial, Ikezawa moved to dismiss on the ground that the six-month period within which trial must commence under Hawai'i Rule of Penal Procedure (HRPP) 48(b)(1) had lapsed. The court denied the motion, and Ikezawa was

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[23] Appellants also cite Village of Menomonee Falls v. Michelson, 104 Wis 2d 137, 311 N.W.2d 658 (1981). Michelson, however, also involved a statutory grant of a jury trial. Id. at 141, 311 N.W.2d at 663.

subsequently convicted of the lesser included offense of assault in the third degree. Ikezawa appealed the court's denial of his Rule 48 motion.

The issue on appeal involved the retroactive application of our decision in State v. Balauro, 73 Haw. 701, 828 P.2d 267 (1992), which had been decided subsequent to Ikezawa's trial. Balauro had departed from previous precedent by interpreting HRPP 48(c)(6) to exclude certain periods of time from the six-month period within which a trial is required. 73 Haw. at 73, 828 P.2d at 268-69. In Ikezawa, this court held that where substantial prejudice results from retrospective application of a new decision, it would be applied prospectively only. 75 Haw. at 220-21, 857 P.2d at 599.

In Ikezawa, we reasoned that "It]he Constitution neither prohibits nor requires retrospective effect. . . . Free to apply decisions with or without

retroactivity, the Court's task is to exercise its discretion, weighing the merits and demerits of retroactive application of the particular rule." Id. at 220, 857 P.2d at 598 (citing State v. Santiago, 53 Haw. 254, 268, 492 P.2d 657, 665 (1971)).

The Ikezawa court recognized the need to consider different factors in determining whether to apply a decision retroactively. We noted that the United States Supreme Court "has given consideration to three factors: (a) the purpose to be served by the newly announced rule[;] (b) the extent of reliance by law enforcement authorities on the old standardst;] and (c) the effect on the administration of justice of a retroactive application of the new standards." Id. (citing Santiago, 53 Haw. at 268-69, 492 P.2d at 665-66). We stated that, alternatively, "'[f]actors to be considered include: Prior history of the rule in question, its purpose and effect, and whether

retroactive operation will further or retard its operation; interests in the administration of justice and the integrity of the judicial process.'" Id. (citing Russell v. Blackwell, 53 Haw. 274, 277, 492 P.2d 953, 956 (1972)). We emphasized that implicit in these factors is the concept of fairness. Id.

Relying on the selective-retroactive doctrine set forth in Santiago and Russell, the court in Ikezawa declined to retrospectively apply its holding in Balauro, applying instead case law applicable prior to Ikezawa's trial. The selective retroactive doctrine in Santiago and Russell was based on United States Supreme Court authority from the 1960s enunciated in, among other cases, Linkletter v. Walker, 381 U.S. 618 (1965); Johnson v. New Jersey, 384 U.S. 719 (1966); and Stovall v. Denno, 388 U.S. 293 (1967). See generally R. Fallon & D. Meltzer, New Law, Non-Retroactivity, and Constitutional

Remedies, 104 Harv. L. Rev. 1731 (1991). Under this doctrine, a court "could deny retroactive effect to a newly announced rule of criminal law" based upon factors such as "the purpose of the new rule, the reliance placed upon the previous view of the law, and the effect on the administration of justice of a retrospective application of the new rule." Harper v. Virginia Dept. of Taxation, ___ U.S. ___, 113 S. Ct. 2510, 2516 (1993) (citations omitted) (internal quotation marks omitted).

The United States Supreme Court, however, has overruled its previous precedents in the non-retroactivity area and now applies retroactively all its **new criminal decisions whose** holdings are applied to the appealing party. In Harper, the Supreme Court recently confirmed that it "overruled Linkletter in Griffith v. Kentucky, 479 U.S. 314 (1987), and eliminated limits on retroactivity in the criminal

context by holding that all newly declared . . . rule[s] must be applied retroactively to all criminal cases pending on direct review." Harper, ____ U.S. at ____, 113 S. Ct. at 2516 (citation omitted) (internal quotation marks omitted).[24] See also United States v. Johnson, 457 U.S. 537, 545-48 (1981) and Powell v. Nevada, ____ U.S. _____, 114 S. Ct. 1280 (1994).

We acknowledge that this recent United States Supreme Court case law, by overruling the doctrinal foundation of Hawai'i case law, could call into question our continued adherence to Ikezawa. However, relying on independent state law grounds, we choose to continue to follow the more flexible test we reiterated in Ikezawa when determining whether to retroactively apply

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[24] Under federal law, a similar rule also now applies in the civil context.- Harper overruled Chevron Oil Co. v. Huson, 404 U.S. 97 (1991) and applied a civil decision retroactively. Harper, ___ U.S. at ____, 113, S. Ct. at 2518 (citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, _____, 113 S. Ct. 2439, 2446 (1991)).

decisions of state law made by this court.

In Ikezawa, we held that the defendant was substantially prejudiced by his reliance on previous precedent because the success of defendant's motion to dismiss turned on whether the Balauro case would be given retroactive effect. Ikezawa, 75 Haw. at 222, 857 P.2d at 599. Thus, the retroactivity question was outcome-determinative. Here, appellants have failed to show how **they would be substantially prejudiced by** the retroactive application of Act 128. The appellants would receive an impartial trial, albeit a non-jury trial, and would face lesser penalties under the new version of HRS § 291-4. As the Supreme Court stated in Duncan:

> We would not assert, however, that every criminal trial -- or any paricular trial -- held before ajudge alone is unfair or that a defendant may never be as fairly treated by ajudge as he would be by ajury. Thus we hold no constitutional doubts about the Practices, common in both federal and state courts, of . . .

prosecuting petty crimes without extending a right to jury trial.

Duncan, 391 U.S. at 158 (emphasis added). Unlike Ikezawa, retroactive application of Act 128 would not be outcome-determinative. Therefore, we hold that retroactive application of today's decision to pending cases passes the test enunciated in Ikezawa. Accordingly, we answer the second reserved question in the affirmative.

C. Equal Protection and Separation of Powers

The trial court made a finding that some DUI defendants, charged after appellants were charged, have already had jury trials. Thus, appellants claim they have been treated differently than similarly situated individuals in violation of their equal protection rights under both the United States and Hawai'i constitutions.

When a denial of equal protection of the laws is alleged, the initial inquiry is whether the legislation is subjected to a

"strict scrutiny" or a "rational basis" test. Baehr v. Lewin, 74 Haw. 530, 571, 8S2 P.2d 44, 63, reconsidera- tion and clarification granted in part, 74 Haw. 645, 852 P.2d 74 (1993). If either a suspect class or fundamental right is involved, the court applies a strict scrutiny analysis. Id. Otherwise, the rational basis standard traditionally applies, that is, whether the statute has a rational relationship to a legitimate government interest. Id. at 572, 852 P.2d at 64.

Act 128 does not divest the appellants of a constitutional right to trial by jury because that right never applied to "petty offenses." In enacting the statute, the legislature merely clarified its original view that first-time DUI offenses are constitutionally petty. Therefore, no fundamental constitutional right being implicated, the court applies a rational basis standard of review.

Act 128 passes a rational-basis review. The purpose of the reduction in penalties is to make clear that first-offense DUI is constitutionally petty. The state interest is to allow non-jury trials for first-offense DUI charges and, therefore, "allevrate the current backlog that is overwhelming the judicial system, and . . . allow for timely adjudication of repeat offenders who pose the greatest risk to the community and public safety." Sen. Stand. Comm. Rep. No. 1107, in 1993 Senate Journal, at 1177. Thus, we hold that the state interest is legitimate and the Act is **rationally related** to the interest. See Meyer v. Jones, 106 N.M. 708, 713, 749 P.2d 93, 98 (1988) (right of jury trial for DUI in "magistrate court" while no right in "metropolitan court" in same state not an equal protection violation).

Moreover, if the court does not apply Act 128 retroactively, defendants charged after enactment of the Act could

argue that they are being denied equal protection. If we were to subscribe to the selective-retroactive application theory proffered by the appellants, those charged after Act 128 would have nonjury trials while those charged before would be entitled to jury trials although all would face the same reduced penalties. Indeed, this is one tenet relied on by the United States Supreme Court in Griffith, in deciding to apply all new criminal decisions retroactively. See Griffith, 479 U.S. at 322-23 ("[s]elective application of new rules violates the principle of treating similarly situated defendants the same. . . . [T]he problem with not applying new rules to cases pending on direct review is 'the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary' of a new rule." (Citation omitted) (Emphasis in original)).

Lastly, appellants raise a

separation of powers argument. They argue that the legislature cannot usurp the judicial branch's power by denying jury trials to first-time DUI offenders. This argument plainly fails because Act 128 itself does not eliminate the jury trial right; this court's interpretation of Act 128 determines whether, as a matter of constitutional law, a defendant must be given the right to a jury trial. Because the legislature does not answer this question for the court, we find no merit to appellants' separation of powers argument. As we indicated previously, the legislature's mere labeling of a criminal offense as "petty" does not necessarily make it so. It is the judicial branch that independently determines whether such a label is justified.

V. CONCLUSION

Based on the foregoing discussion, we hold that a charge of first-offense DUI under HRS § 291-4, as amended by Act 128, is

constitutionally petty and, therefore, no right to jury trial attaches to first-offense DUI. Conseguently, we overrule State v. Jordan, 72 Haw. 597, 825 P.2d 1065 (1992), to the extent that it deals with first-offense DUI. We specifically limit Jordan to repeat DUI offenses, which remain constitutionally serious. Accordingly, we answer the first reserved question in the affirmative.

We also hold that (1) the retrospective application of HRS § 291-4, as amended by Act 128 does not violate the ex post facto clause of the United States Constitution and, (2) retroactive application of our decision today to pending cases passes the test enunciated in State v. Ikezawa, 75 Haw. 210, 857 P.2d 593 (1993). We therefore answer the second reserved question in the affirmative.

Having answered both reserved questions affirmatively, we remand those cases which are the subject of appeal No. 17317, that is,

Nakata, Lau, and Daoang for further proceedings. We also deny Whittington's petition for writ of mandamus and/or prohibition.

Paul J. Cunney (Arthur E. Ross and Robert D. Eheler, Jr., with him on the briefs) for defendants-appellants Glenn Nakata and Alvin R. L. Lau in No. 17317

/s/ R. Moon

/s/ R. Klein

/s/ S. Levinson

/s/ P. Nakayama

Theodore Y. H. Chinn, Deputy Public Defender, for defendant-appellant Eddie Daoang in No. 17317

/s/ M. Ramil

James M. Anderson, Deputy Attorney General, for plaintiff-appellee State of Hawai'i in No. 17317

Stephen S. Michaels (Gerard D. Lau, with. him on the amicus brief), Deputies Attorney General, for Amicus Curiae Attorney General of Hawai'i in No. 17317

Paul J. Cunney, Arthur E. Ross and Robert D. Eheler, Jr., on the writ for petitioner Jon David Whittington in No. 17228

Steven S. Michaels, Deputy Attorney General, for respondcnts in No. 17228

Appendix "B"

IN THE SUPREME COURT
OF THE STATE OF HAWAI'I

---oOo---

[Filed Aug. 18. 1994]

STATE OF HAWAI'I, Plaintiff-Appellee,
v. GLENN NAKATA, Defendant-Appellant
(CR. NO. 90-1679)

STATE OF HAWAI'I, Plaintiff-Appellee,
v. ALVIN K. L. LAU, Defendant-Appellant
(CR. NO. 90-1657)

STATE OF HAWAI'I, Plaintiff-Appellee,
v. EDDIE DAOANG, Defendant-Appellant
(CR. NO. 90-1838)

NO. 17317

and

JON DAVID WHITTINGTON, Petitioner,
v. JAMES H. DANNENBERG, in his capacity as Judge of the District Court of the First Circuit, State of Hawai'i, and all other District Court Judges of the State of Hawai'i, STATE OF HAWAI'I, the real party in interest, Respondents

NO. 17228

MOTIONS FOR RECONSIDERATION

(CASE NOS. OF 5/4/93)

AUGUST 18, 1994

MOON, C.J., KLEIN, LEVINSON,
NAKAYAMA, AND RAMIL, JJ.

Having considered defendent-appellants Glenn Nakata, Alvin K. L. Lau, and petitioner Jon

David Whittington's motion for reconsideration, filed on August 12, 1994, as well as defendant-appellant Eddie Daoang's motion for reconsideration filed on August 12, 1994,

IT IS HEREBY ORDERED that both motions for reconsideration are denied.

Arthur E. Ross for
defendants-appellants
Glenn Nakata and
Alvin K. L. Lau in
No. 17317 and for
petitioner Jon David
Whittington in
No. 17228

/s/ R. J. Moon

/s/ Robert Klein

/s/ Steven Levinson

Theodore Y. H. Chinn,
Deputy Public Defender,
for defendant-appellants
Eddie Daoang in
No. 17317

/s/ Paula Nakayama

/s/ Mario R. Ramil

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---oOo-[Filed Aug. 18. 1994]

STATE OF HAWAI'I, Plaintiff-Appellee, v.
GLENN NAKATA,
Defendant-Appellant (CR. NO. 90-1679)

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ALVIN K. L. LAU,
Defendant-Appellant (CR. NO. 90-1657)

STATE OF HAWAI'I, Plaintiff-Appellee, v.
EDDIE DAOANG,
Defendant-Appellant (CR. NO. 90-1838)

NO. 17317

and

JON DAVID WHITTINGTON, Petitioner, v.
JAMES H. DANNENBERG, in his capacity as Judge of the District Court of the First Circuit, State of Hawai'i, and all other District Court Judges of the State of Hawai'i, STATE OF HAWAI'I, the real party in interest, Respondents

NO. 17228

ORDER OF AMENDMENT

(CASE NOS. OF 5/4/93)

AUGUST 18, 1994

MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

The opinion of the court, filed on August 2, 1994, is hereby amended as follows:

1. On page 29 of the opinion, the

parenthetical phrase following Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), is amended to read "(holding that a jury trial is provided for any criminal offense, regardless of potential prison sentence, under the Alaska Constitution)." The amendment deletes the phrase "analyzing a DUI statute with a maximum penalty of $600 and sixty days imprisonment and."

2. On page 29 of the opinion, the sentence following the reference to Baker is amended to read: "These cases review constitutional requirements, legislative histories, and penalties different under Hawai'i's DUI statute."

The Clerk of the Court is directed to incorporate the foregoing changes in the original opinion.

/s/ R. J. Moon
/s/ Robert Klein
/s/ Steven Levinson
/s/ Paula Nakayama
/s/ Mario R. Ramil

Appendix "C"

NOS. 17317 and 17228

IN THE SUPREME COURT OF THE STATE OF HAWAII

S. C. NO. 17317:	CR. No. 90-1679
STATE OF HAWAII Plaintiff, v. GLENN NAKATA, Defendant.	
STATE OF HAWAII, Plaintiff, v. ALVIN K. L. LAU, Defendant.	CR. No. 90-1657
STATE OF HAWAII, Plaintiff, v. EDDIE DAOANG, Defendant.	CR. No. 90-1838
S.C. NO. 17228: JON DAVID WHITTINGTON, Petitioner, v.	CASE NOS. OF 05-04-93

[caption continued on next page]

JAMES H. DANNENBERG, In his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and all other District Court Judges of the State of Hawaii; STATE OF HAWAII, the real party in Interest, Respondents.	[ORDER]

ORDER

Upon review of the record in State v. Nakata, No. 17317, and Whittington v. Dannenberg, No. 17228, and it appearing the two cases raise the same issues for consideration,

IT IS HEREBY ORDERED, that No. 17317 and No. 17228 are consolidated for further disposition under No. 17317. Any future documents in Whittington v. Dannenberg, shall be filed under the consolidated number.

DATED: Honolulu, Hawaii, October 12, 1993.

/s/ H. Lum

Associate Justice

Appendix "D"

RONALD G. JOHNSON, ESQ.
Deputy Prosecuting Attorney

PAUL J. CUNNEY, ESQ.
Attorney for Defendants
Nakata and Lau [Filed July 30, 1993)

THEODORE Y. H. CHINN, ESQ.
Deputy Public Defender
Attorney for Defendant Daoang

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII Plaintiff, v. GLENN NAKATA, Defendant.	CR. No. 90-1679 COUNTS I & II: DRIVING UNDR THE INFLUENCE OF INTOXICATING LIQUOR COUNT III: FAILURE TO STOP AT A STOP SIGN COUNT IV: DRIVING ON ROADWAYS LANED FOR TRAFFIC
STATE OF HAWAII, Plaintiff, v. ALVIN K. L. LAU, Defendant.	CR. No. 90-1657 DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR

[caption continued on next page]

STATE OF HAWAII,	)	CR. No. 90-1838
Plaintiff,	)	COUNTS I & II: DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR
v.	)	COUNT III: DISREGARDING A RED TRAFFIC CONTROL SIGNAL LEGEND
EDDIE DAOANG,	)	COUNT IV: NON-COMPLIANCE WITH SPEED LIMIT
Defendant.	)	ORDER PRESERVING QUESTIONS OF LAW PURSUANT TO RULE 15 OF THE HAWAII RULES OF APPELLATE PROCEDURE; EXHIBIT "A"

ORDER RESERVING QUESTIONS OF LAW PURSUANT TO RULE 15 OF THE HAWAII RULES OF APPELLATE PROCEDURE

This Court believes that there are important and far reaching Constitutional questions that have been presented in the instant cases and it is appropriate, pursuant to Rule 15 of the Hawaii Rules of Appellate Procedure, to reserve them for consideration by the Hawaii Appellate Courts. This Court hereby reserves the questions presented in the above-entitled cases, as contained within its

findings filed July 30, 1993, and attached hereto as Exhibit "A", for consideration by the Hawaii Supreme Court.

Pursuant to Rule 15 of the Hawaii Rules of Appellate Procedure, this Court hereby designates the entire record in the above-entitled cases, including but not limited to, the Circuit Court files and their full contents under Criminal Number 90-1679, 90-1657, 90-1838; the minutes of the Court with respect to the above-referenced cases, the reporter's transcripts of the proceedings, all exhibits entered and documents filed in the instant cases, as the record for the findings and reserved questions attached hereto as Exhibit "A".

This Court directs the Clerk of the Circuit Court of the First Circuit, State of Hawaii, to transmit the above-referenced record, including this Order, to the Clerk of the Supreme Court, State of Hawaii.

DATED: Honolulu, Hawaii, July, 30, 1993.

/s/ Dexter D. Del Rosario
THE HONORABLE DEXTER D. DEL ROSARIO
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ Ronald G. Johnson
RONALD G. JOHNSON
Prosecuting Attorney
State of Hawaii

APPROVED AS TO FORM:

/s/ Arthur E. Ross for
PAUL J. CUNNEY, ESQ.
Attorney for Defendants
Glenn Nakata and
Alvin K.L. Lau

APPROVED AS TO FORM:

/s/ Theodore Y.H. Chinn
THEODORE Y.H. CHINN
Deputy Public Defender
Attorney for Defendant
Eddie Daoang

RONALD G. JOHNSON, ESQ.
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PAUL J. CUNNEY, ESQ.
Attorney for Defendants
Nakata and Lau [Filed July 30, 1993)

THEODORE Y. H. CHINN, ESQ.
Deputy Public Defender
Attorney for Defendant Daoang

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII Plaintiff, v. GLENN NAKATA, Defendant.	)	CR. No. 90-1679 COUNTS I & II: DRIVING UNDR THE INFLUENCE OF INTOXICATING LIQUOR COUNT III: FAILURE TO STOP AT A STOP SIGN COUNT IV: DRIVING ON ROADWAYS LANED FOR TRAFFIC
STATE OF HAWAII, Plaintiff, v. ALVIN K. L. LAU, Defendant.	)	CR. No. 90-1657 DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR

[caption continued on next page]

EXHIBIT "A"

STATE OF HAWAII,	)	CR. No. 90-1838
Plaintiff,	)	COUNTS I & II: DRIVING UNDER THE INFLUENCE OF INTOXICATING LIQUOR
v.	)	
EDDIE DAOANG,	)	COUNT III: DISREGARDING A RED TRAFFIC CONTROL SIGNAL LEGEND
Defendant.	)	COUNT IV: NON-COMPLIANCE WITH SPEED LIMIT
	)	FINDINGS OF FACT AND RESERVED QUESTIONS OF LAW

FINDINGS OF FACT
AND RESERVED QUESTIONS OF LAW

The State of Hawaii, having filed a Motion to Remand Case to the District Court of the First Circuit for Trial on the Merits, the motion having come on for hearing on July 29, 1993, before the Honorable Dexter D. Del Rosario, Judge of the above-entitled Court, and the Court having accepted the stipulations of the parties, having heard the argument of counsel, and being fully advised in the premises, makes the following findings:

FINDINGS OF FACT

1. That Glenn Nakata, Alvin K. L. Law, and Eddie Daoang (hereinafter "Defendants") are all charged with a first offense of Driving Under the Influence of Liquor (hereinafter "DUI"), in violation of Section 291-4 of the Hawaii Revised Statutes (hereinafter "HRS").

2. The instant cases are currently pending jury trial in the Circuit Court of the First Circuit.

3. A Motion to Remand Case to the District Court of the First Circuit for Trial on the Merits was filed in each of the above-entitled cases by the Honolulu City Prosecutor's office on behalf of the State of Hawaii (hereinafter "the State").

4. The Court took judicial notice of all the records and files docketed with the Circuit Court in Criminal Numbers 90-1679, 90-1657, and 90-1838.

5. The Court took judicial notice of Hawaii Rules of Penal Procedure, Rule 5(b)(4),

HRS 602-5(2), and Hawaii Rules of Appellate Procedure, Rule 15.

6. The Court took judicial notice that HRS 291-4 was amended by the legislature so that the maximum period of incarceration for first-time offenders is five (5) days. (House Bill 747, Act 128). The amendment became effect May 21, 1993.

7. The Court took judicial notice that jury trials had occurred after May 21, 1993, in the Circuit Court of the First Circuit, for DUI cases which had been pending prior to that date.

8. The Court took judicial notice that, pursuant to State v. Leatiota, 69 Haw. 253 (1987), DUI traffice offense and Rule 48, Hawaii Rules of Penal Procedure, does not apply to DUI cases.

9. The Court took judicial notice that specific traffic offenders must comply with the financial responsibility requirements under the Motor Vehicle Safety Responsibility Act, HRS

287-20.

10. The Court took judicial notice that the traffic offenses which trigger a financial responsibility requirement under HRS 287-20 include: reckless driving, inattention to driving, driving while under the influence of drugs, driving while under the influence of intoxicating liquor, conviction of a moving offense while at fault in a major motor vehicle accident, and conviction of a No-Fault insurance offense.

11. The Court took judicial notice that some DUI cases with a date of offense after the instant cases have completed jury trials.

12. The Court took judicial notice that a person convicted under HRS 291-4 may be required to perform up to 72 hours of community service.

13. The Court took judicial notice that prior to the May 21, 1993, amendment to HRS 291-4, the sentencing scheme of HRS 291-4 required installation of an ignition interlock

system; such sentencing scheme was neve implemented, and the May 21, 1993, amendment to HRS 291-4 removed said requirements for an ignition interlock device.

14. Pursuant to State's Exhibits 1(a), 1(b) and 1(c) (hereinafter "State's Exhibit 1"), the parties stipulate that a person convicted under HRS 291-4 who elects a blood test may bear the cost of such test.

15. Pursuant to State's Exhibit 1, the parties stipulate that a defendant who hires a private defense attorney bears such cost.

16. Pursuant to State's Exhibit 1, if called to testify, Gwen Ha, a representative of the Criminal Assignments division of the Circuit Court, would testify as follows:

a. There are currently three thousand three hundred and seventy-five DUI cases pending jury trial.

b. One Circuit Court courtroom is primarily responsible for hearing DUI jury trials.

c. DUI jury trials are calendared chronologically, with the earliest offense dates being called to trial first.

d. Circuit Court dockets and assigns the trial week for all DUI jury trials.

e. The State does not decide which DUI jury trial is called for trial.

17. Pursuant to State's Exhibit 1, if called to testify, Steven Alm, Misdemeanor Prosecution Director, would testify as follows:

a. The current policy of the State in a DUI case is to dismiss the related traffic charges in exchange for a guilty plea to the DUI.

b. A DUI offense is rarely plea-bargained to a lesser charge due to the enhanced sentencing scheme provided in HRS 291-4 for repeat offenders.

18. Pursuant to the State's Exhibit 1, if called to testify, Mona McNamara, a section supervisor with the State Department of Finance, would testify as follows:

a. Ms. McNamara is responsible for the enforcement of the Motor Vehicle Safety Responsibility Act and its financial responsibility provisions.

b. There are four ways to post proof of financial responsibility: (1) proof of insurance via Form SR-22, (2) posting a bond in accordance with the Act, (3) depositing money or securities in the amount of twenty-five thousand dollars, or (4) submitting a self-insurance certification under HRS 287-22.

c. Approximately 65% of the individuals who comply with the Act do so by way of an SR-22, as opposed to posting a bond.

d. The financial responsibility requirement remains in effect for three years from date of conviction.

e. The money or securities posted are refundable after the three-year period if no lawsuits occur during that period.

f. Failure to post proof of financial responsibility results in a driver's

license suspension for three years, or until compliance.

g. The Department of Finance does not control the cost that insurance companies charge individuals for posting an SR-22.

h. Proof of financial responsibility, or posting of an SR-22, is also required for driver's license revocation under HRS 286-14.

19. Pursuant to State's Exhibit 1, if called to testify, Shelly Santos, a representative from the Hawaii Insurance Commissioner's Office, would testify as follows:

a. The last study conducted on DUI insurance rates was in 1990.

b. The Hawaii Insurance Commission currently utilizes this study.

c. According to the 1990 study, the average insurance rate for a 1990 Toyota Camry for a driver with a clear traffic abstract is approximately $1,086.00 per year; the same

coverage for a person convicted of a DUI costs $7,913.00 a year. A 1986 Ford Tempo GL costs $962.00 annually to insure with a clear traffic abstract and $7,131.00 with a DUI conviction. A 1990 BMW0325 costs $1,798.00 annually to insure with a clear traffic abstract and $14,413.00 with a DUI conviction.

d. Insurance companies are for-profit organizations who set rates based on perceived risks which they assess and assign to drivers based on a number of factors. An individual's driving record is one such factor.

e. The rate an insurance company charges for an SR-22 is directly related to the profit and risk that the company is willing to bear.

f. Given the number of people who are insured versus the number of people who have been convicted of DUI, insurance companies could lower rates for those convicted and absorb the cost.

20. Pursuant to State's Exhibit 1, if

called to testify, Michael Muraoka, a representative of the Division of Driver Education, State of Hawaii Judiciary, would testify as follows:

a. The cost of an alcohol abuse assessment and resultant report by a substance abuse counselor ranges from 0-$150.00 and is dependent on the defendant's financial status at the time of the assessment.

b. 90 - 95% of the first-time DUI offenders are not required to undergo alcohol abuse treatment.

c. If required to undergo alcohol abuse treatment, the defendant bears the cost.

d. Alcohol abuse treatment cost covers a broad range depending on the type of treatment facility chosen.

21. Pursuant to Defense Exhibit A, if called to testify, Pauline Namuo, the Driver Education Administrator of the Division of Driver Education, State of Hawaii Judiciary, would testify as follows:

a. The Division of Driver Education supervises defendants who are convicted of DUI and monitor their compliance with the sentence ordered by the trial court.

b. DUI offenders are required to confer with a representative of the Division of Driver Education regarding the assessment of the offender's alcohol abuse or dependence and the need for appropriate treatment.

c. The Division of Driver Education has a Court Referral List for Substance Abuse Assessments which is a list of substance abuse counselors who are certified by the Department of Health to perform assessments of alcohol abuse of dependence.

d. With assistance from a representative of Driver Education, the DUI offenders select a counselor from this list of certified counselors for alcohol assessment.

e. The fees for the assessment charged by the various certified counselors are listed in the Court Referral List.

f. DUI offenders are responsible for the cost of the assessments.

g. Ms. Namuo is aware that 1) the offender's medical insurance (provided that the offender does have medical insurance and the medical insurance policy will cover the expense) will pay for a substantial portion of the fee, 2) depending on the financial status of the offender, state funding through welfare on Medicaid may pay for the entire cost of the fee, and 3) certain individuals, such as Vietnam/combat zone military veterans, may have the assessment performed free of charge.

h. If the assessment reports that the offender requires alcohol abuse or dependency treatment, then the offender is required to undergo treatment at his/her expense.

i. Similar to the assessments, the Division of Driver Education has a Court Referral List for Substance Abuse Treatment which is a list of substance abuse counselors

and agencies who are certified by the Department of Health to perform treatment of alcohol abuse or dependence.

j. With assistance from a representative of Driver Education, the DUI offenders will select a counselor or agency from this list of certified counselors and agencies for alcohol treatment.

k. The Division of Driver Education does not have the fee schedule charged by the various certified counselors and agencies for alcohol abuse treatment.

l. Similar to the assessments, Ms. Namuo is aware that the offender's medical insurance and the medical insurance policy will cover the expense) will pay for a substantial portion of the cost for treatment and that depending on the financial status of the offender, state funding through welfare or Medicaid may pay for a substantial, if not, the entire cost of the treatment.

22. Pursuant to Defense Exhibit A, if

called to testify, Darlene Wade, administrator with Anodyne, Inc., a provider who is certified for alcohol abuse treatment by the Department of Health, would testify as follows:

a. Anodyne offers outpatient alcohol abuse treatment.

b. Anodyne charges $150.00 for each session and $75.00 for each group session, although a sliding fee schedule is available if a client has financial hardship.

c. A client typically attends one individual or group session per week, and typically, the treatment program runs for six months to one year depending on the progress and condition of the client.

d. The average cost of the program is $3,600.00 to $7,200.00

e. Most Hawaii insurance plans will cover 50% to 80% of the cost of the treatment.

f. Anodyne will accept Medicaid coverage.

23. Pursuant to Defense Exhibit A, if

called to testify, Sharon Holland, office manager of Hawaii Counseling and Education Center, Inc. (hereinafter "Center"), an agency that is certified for alcohol abuse treatment by the Department of Health, would testify as follows:

a. The Center offers intensive outpatient alcohol abuse treatment.

b. An individual session costs $100.00 and a group session costs $40.00.

c. The program is individually based, and clients in the program are required to attend individual and group sessions three times a week initially and are seen less frequently as they progress in the treatment.

d. The length of the treatment varies from individual to individual, with the shortest period being four months and an average of eight months.

e. The average cost of treatment is approximately $3,000.00

f. The Center participates in HMSA

medical insurance plan and other insurance plans, which generally pay 80% of the cost of treatment.

g. A Client Instruction Sheet details certain program requirements regarding client responsibility for payment of the cost of treatment and other charges.

24. Pursuant to Defense Exhibit A, if called to testify, Karin Shelley, the Outpatient Director with Hina Mauka, an agency that is certified for alcohol abuse treatment by the Department of Health, would testify as follows:

a. The fee for the outpatient alcohol treatment program is $1,680.00.

b. The program will only accept clients who have medical insurance or pay on their own.

c. Most medical insurance plans will pay for 80% of the cost of the treatment.

25. Pursuant to Defense Exhibit A, if called to testify, Renee Shimabukuro, risk

manager of the Castle Medical Center (hereinafter "Center"), an agency that is certified for alcohol abuse treatment, would testify as follows:

a. The Alcohol and Addiction Program provides outpatient, residential and inpatient alcohol abuse treatment.

b. The program is highly individualized and tailored to the needs of each patient.

c. The fee for outpatient counseling is variable and the Center charges the following fees: 1) $26.00 per session for aftercare, 2) $73.50 per session for outpatient counseling, and 3) $148.50 for outpatient day treatment.

d. The length of the outpatient treatment varies from individual to individual, although typically, the patient is required to attend three session per week and the length of treatment varies with from four to eight weeks.

e. The fee for inpatient care varies

from $605.00 per day for full hospitalization to $448.00 per day for residential care to $297.00 per day for partial hospitalization.

f. The length of the residential treatment varies from individual to individual, although typically, the patient is hospitalized for ten days and thereafter the patient is placed on either full outpatient or partial outpatient care with the length of care averaging four to eight weeks.

g. The Center participates in HMSA medical insurance plan and other insurance plans.

h. The Center provides free services through the Department of Health for outpatient services.

26. Pursuant to Defense Exhibit A, if called to testify, Marlene Nalani, the Director of Admissions with Salvation Army ATS, an agency that is both State licensed and certified for alcohol abuse treatment, would testify as follows:

a. Salvation Army ATS provides alcohol detoxification, outpatient and residential alcohol and drug abuse treatment.

b. Alcohol detoxification is typically a five-day client treatment stay with a cost of $115.00 per day.

c. Outpatient treatment is typically a program of 32 primary care sessions and 12 aftercare sessions, with additional session based on need. The client attends three to four sessions per week up to two months, at a cost of $60.00 per session.

d. Residential treatment program is typically a 90-day program costing $115.00 per day, for a total cost of $10,350.

e. Salvation Army ATS participates in medical insurance such as HMSA and Kaiser; insurance will typically pay for 70% to 90% of the cost of the treatment.

f. Salvation Army ATS also has state funding which is available for qualified indigent individuals, which pays for the entire

cost of the treatment except for the room and board portion of the residential treatment program.

Pursuant to HRS 602-5(2) and Rule 15 of the Hawaii Rules of Appellate Procedure, the Court reserves the following questions of law for the Supreme Court of Hawaii:

RESERVED QUESTIONS OF LAW

1. Whether the amendments to the sentencing provisions of HRS 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, eliminates the rights to jury trial for defendants charged with a first offense under HRS 291-4.

2. If the amendments to the sentencing provisions of HRS 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, do eliminate the right to jury trial, whether the deprivation of such a right may be applied retrospectively to

alleged offenses occurring prior to the enactment of the Act.

DATED: Honolulu, Hawaii, July, 30, 1993.

/s/ Dexter D. Del Rosario
THE HONORABLE DEXTER D. DEL ROSARIO
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ Ronald G. Johnson
RONALD G. JOHNSON
Prosecuting Attorney
State of Hawaii

APPROVED AS TO FORM:

/s/ Arthur E. Ross for
PAUL J. CUNNEY, ESQ.
Attorney for Defendants
Glenn Nakata and
Alvin K.L. Lau

APPROVED AS TO FORM:

/s/ Theodore Y.H. Chinn
THEODORE Y.H. CHINN, ESQ.
Deputy Public Defender
Attorney for Defendant
Eddie Daoang

Appendix "E"

No. 17317

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII Plaintiff, v. GLENN NAKATA, Defendant.	)	CR. No. 90-1679
STATE OF HAWAII, Plaintiff, v. ALVIN K. L. LAU, Defendant.	)	CR. No. 90-1657
STATE OF HAWAII, Plaintiff, v. EDDIE DAOANG, Defendant.	)	CR. No. 90-1838

ORDER

Upon consideration of the Order Reserving Questions of Law Pursuant to Rule 15 of the Hawaii Rules of Appellate Procedure.

IT IS HEREBY ORDERED, pursuant to HRS,

Section 602-5(2) and HRAP Rule 15, that this court accepts jurisdiction.

IT IS FURTHER ORDERED that the parties shall file briefs on the reserved questions as follows:

1. The briefs shall conform to the format and content requirement of HRAP Rule 28 insofar as applicable.

2. The defendants are designated as the appellants in this case and shall file an opening brief within 20 days from the date of this order.

3. The State is designated as the appellee and shall file an answering brief within 20 days after service of the opening brief.

4. Reply briefs may be filed within five days after service of the answering briefs. The reply brief shall be confined to matters presented in the answering brief. If no reply brief is to be filed, the appellants shall notify the clerk and appellee in writing

reply brief.

5. Oral argument will be scheduled at a later date.

6. Pursuant to HRAP Rule 28(g) the Attorney General may file an amicus brief in this case.

DATED: Honolulu, Hawaii, August 18, 1993.

FOR THE COURT

/s/ H. Lum

Chief Justice

No. 17317 State v. Nakata

Appendix "F"

No. 17317

STATE OF HAWAII Plaintiff-Appellee, v. GLENN NAKATA, Defendant-Appellant.	)	CR. No. 90-1679
STATE OF HAWAII Plaintiff-Appellee, v. ALVIN K. L. LAU, Defendant-Appellant.	)	CR. No. 90-1657

No. 17228

JON DAVID WHITTINGTON, Petitioner, v. JAMES H. DANNENBERG, In his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and all other District Court Judges of the State of Hawaii; STATE OF HAWAII, The real party in Interest, Respondents.	)	Case Nos. of 5-4-93 DRIVING UNDER THE INFLUENCE OF INTOXICATNG LIQUOR (H.R.S., Sect, 291-4) SAFETY INSPECTION (H.R.S., Sect. 286-25) POLICE REPORT NO. 93-043370

MOTION FOR RECONSIDERATION

CERTIFICATE OF GOOD FAITH

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

and

CERTIFICATE OF SERVICE

LAW OFFICE OF PAUL J. CUNNEY
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PAUL C. CUNNEY 3145
ARTHUR E. ROSS 1005

Attorneys for Defendant-Appellants
GLENN NAKATA & ALVIN K.L. LAU

and Attorney for Petitioner
JON DAVID WHITTINGTON

No. 17317

STATE OF HAWAII Plaintiff-Appellee, v. GLENN NAKATA, Defendant-Appellant.	)	CR. No. 90-1679

STATE OF HAWAII Plaintiff-Appellee, v. ALVIN K. L. LAU, Defendant-Appellant.	)	CR. No. 90-1657

No. 17228

JON DAVID WHITTINGTON, Petitioner, v. JAMES H. DANNENBERG, In his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and	)	Case Nos. of 5-4-93 DRIVING UNDER THE INFLUENCE OF INTOXICATNG LIQUOR (H.R.S., Sect, 291-4) SAFETY INSPECTION (H.R.S., Sect. 286-25)

all other District Court Judges of the State of Hawaii; STATE OF HAWAII, The real party in Interest,	)	POLICE REPORT NO. 93-043370
Respondents.	)	MOTION FOR RECONSIDERATION

MOTION FOR RECONSIDERTION

Defendant-Appellants Glenn Nakata, Alvin K. L. Lau, and Petitioner, John Whittington, by and through their attorneys, Paul J. Cunney and Arthur E. Ross, hereby move this Court to reconsider its opinion filed August 2, 1994, for the reason that the opinion failed to answer the separate issue raised by Whittington, misinterpreted the impact of the financial responsibility law on insurance rates, and incorrectly concluded that appellants have failed to show how they would be substantially prejudiced by the retroactive application of Act 128.

This motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based upon the memorandum

of law and certificate of good faith attached hereto, and the records and files in this case.

DATED: Honolulu, Hawaii, August 12, 1994.

/s/ Arthur E. Ross
ARTHUR E. ROSS
Attorney for Defendant-Appellants
GLENN NAKATA & ALVIN K.L. LAU

and Attorney for Petitioner
JON DAVID WHITTINGTON

No. 17317

STATE OF HAWAII Plaintiff-Appellee, v. GLENN NAKATA, Defendant-Appellant.	)	CR. No. 90-1679
STATE OF HAWAII Plaintiff-Appellee, v. ALVIN K. L. LAU, Defendant-Appellant.	)	CR. No. 90-1657

No. 17228

JON DAVID WHITTINGTON, Petitioner, v. JAMES H. DANNENBERG, In his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and	)	Case Nos. of 5-4-93 DRIVING UNDER THE INFLUENCE OF INTOXICATNG LIQUOR (H.R.S., Sect, 291-4) SAFETY INSPECTION (H.R.S., Sect. 286-25)

all other District Court Judges of the State of Hawaii; STATE OF HAWAII, The real party in Interest, Respondents.	)	POLICE REPORT NO. 93-043370 CERTIFICATE OF GOOD FAITH

CERTIFICATE OF GOOD FAITH

I hereby certify, as one of the attorneys for Appellants Glenn Nakata, Alvin K. L. Lau, and Petitioner John Whittington, that the foregoing Motion for Reconsideration is presented in good faith and not for purposes of delay.

DATED: Honolulu, Hawaii, August 12, 1994.

/s/ Arthur E. Ross
ARTHUR E. ROSS

No. 17317

STATE OF HAWAII Plaintiff-Appellee, v. GLENN NAKATA, Defendant-Appellant.	)	CR. No. 90-1679
STATE OF HAWAII Plaintiff-Appellee, v. ALVIN K. L. LAU, Defendant-Appellant.	)	CR. No. 90-1657

No. 17228

JON DAVID WHITTINGTON, Petitioner, v. JAMES H. DANNENBERG, In his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and	)	Case Nos. of 5-4-93 DRIVING UNDER THE INFLUENCE OF INTOXICATNG LIQUOR (H.R.S., Sect, 291-4) SAFETY INSPECTION (H.R.S., Sect. 286-25)

all other District Court Judges of the State of Hawaii; STATE OF HAWAII, The real party in Interest,	)	POLICE REPORT NO. 93-043370
Respondents.	)	MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

MEMORANDUM OF LAW IN SUPPORT OF MOTION - FOR RECONSIDERATION

I. Premature Denial of Jury Trial

The opinion fails to answer the separate issue raised in Whittington's petition for writ of mandamus and/or prohibition, to wit: Whether the district court prematurely denied him a jury trial before the Governor signed Act 128 on May 21, 1993?

On May 4, 1993, Whittington demanded a jury trial which was denied by Judge Dannenberg who set the case for a bench trial. As a result, Whittington, sought relief by way of a petition for writ claiming inter-alia the district court exceeded its authority in denying him a jury trial before the law became effective.

Although the opinion decides most of the issues raised in the petition, it fails to answer the question of whether the lower

court acted prematurely in denying Whittington a jury trial on May 4, 1993.

II. Premature Denial of Jury Trial

The opinion incorrectly concluded that the increased rated changed by private insurance companies for violating HRS §291-4 is not mandated by law and therefore, the statutory "penalty" is not a result of "State" action.

The trial court found that an individual convicted of DUI must comply with the financial responsibility requirement under HRS §287-20. Findings No. 9.

The trial court further noted that representative from the Department of Finance would testify to the following. Findings No. 18. The Department of Finance is responsible for the enforcement and compliance with HRS §287-20. Findings No. 18(a). There are four ways in which this requirement may be met: (1) proof of insurance via Form SR-22, (2) posting bond in accordance with the Act, (3) the depositing of money or securities in the amount of $25,000, and (4) submitting a self-insurance certificate under HRS §287-22. Findings No. 18(b). This requirement exists for a three

year period and non-compliance will result in the individual's license suspended for the three year period or until compliance. Findings 18(d) - (f). Approximately 65% of the individuals who comply with the requirement elects to do so by the way of SR-22, proof of insurance. Findings 18(c).

A representaitve from the Hawaii Insurance Commissioner's Office would testify to the following. Findings No. 19. The insurance rate for the individual with a clean driving record who is convicted of DUI will see an increase of between 7 to 8 times the existing insurance premium. Findings No. 19(c).

The requirement for proof of financial penalty pursuant to HRS §287-20 was not changed by Act 128. This requirement results in a financial penalty amounting to thousands of dollars annually for three years in order for one convicted of DUI to obtain a new drivers license. For example, the average insurance rate changed for a 1990 Toyota Camry, for a person with a clean driving record, is approximately $1086 for a year. Findings No. 19(c). The same coverage for a person convicted of DUI would cost $7913 for a year.

Although the rate an insurance company charges for an SR-22 is directly related to the profit and risk that the company is willing to bear, it is unrealistic to believe that the rates would be lowered and the cost absorbed by the carrier. Likewise it is unrealistic to say that HRS §287-20 has no impact on drivers convicted of DUI, since proof of insurance, a bond or $25,000 must be posted and, if not, a three year suspension of license results.

The Court's analysis of the financial responsibility law is flawed because the State Insurance Commissioner has neither placed a cap on the rate of increase nor has he done anything to control the amount of increase the insurance companies can charge, leaving all drivers at their mercy. To hold that these rate increases are not mandated by statute and are not considered a statutory penalty defies reality and requires reexamination of the issue. The State of Hawaii requires all licensed drivers to have no-fault insurance. The law also provides for an Insurance Commissioner who exercises no control over the rates charged by insurance companies selling no-fault policies in Hawaii. To hold that the increased rates are not statutory penalties because neither chapter 287 nor any other

statutory scheme mandates that insurance companies increase rates for drivers convicted of DUI, belies the trial court's findings of facts.

Unlike the Nevada statutes considered in Blanton v. City of North Las Vegas, 489 U.S. 538, 543 n. 8, the actual impact of the financial responsibility laws in Hawaii is not too attenuated to be considered a statutory penalty.

III. Prejudice Resulting from Retroactive Application of Act 128

In State v. Ikezawa, 75 Haw. 210, 857 P.2d 593 (1993), this Court held that where substantial prejudice results from retrospective application of a new decision, it would be applied prospectively only, 75 Haw. at 220-21, 857 P.2d at 599. Yet, the opinion in this case, though purporting to adhere to the test set forth in Ikezawa, is decided adversely to appellants solely on the basis of the retroactivity question not being outcome-determinative. None of the factors enunciated in Ikezawa, such as the effect on the administration of justice of a retroactive application of the new standards, whether retroactive operation will further or retard its

operation and the integrity of judicial process, was considered in concluding retroactive application of court decisions is not fundamentally unfair. Certainly first time DUI offenders will pay the price with the loss of their right to a jury trial.

The opinion completely ignores the fact that appellants Nakata, Lau, Daong, had relied on the State v. O'Brien, 68 Haw. 38, 704 P.2d 883 (1985) when they requested a jury trial four years earlier. The trial court made a finding that as of July 39, 1993, 3375 jury trial DUI cases were pending in the First Circuit Court and only one courtroom was allocated to hear these cases. Obviously there must be some advantage to a jury trial over a bench trial or the huge backlog would not have triggered the passage of Act 128. The obvious advantage, which the opinion seeks to play down, is that the odds of obtaining an acquittal are much better at a jury trial. If they weren't, there would be no need to have a jury trial at all and appellants and all others similarly situated, would have no reason to continue their opposition to the court's decision.

The Court's argument that selective application of new rules

violates the principles of treating similarly situated defendants the same does not make sense in light of the fact that more than a hundred jury trials have been held since the effective date of Act 128. Judicial economy should not be the measuring stick for determining whether retroactive effect should be given to pending cases. Likewise, the Court's belief that actual inequity results unless retroactive application is given to all new criminal decisions is fallacious in view of the prior history of cases where only prospective effect was given, Johnson v. New Jersey, 384 U.S. 719 (1966); Linkletter v. Walker, 381 U.S. 618 (1965); and Stovall v. Denno, 388 U.S. 293 (1967).

IV. Conclusion

The motion for reconsideration should be granted.

DATED: Honolulu, Hawaii, August 12, 1994.

/s/ Arthur E. Ross
ARTHUR E. ROSS
Attorney for Defendant-Appellants
GLENN NAKATA & ALVIN K.L. LAU

and Attorney for Petitioner
JON DAVID WHITTINGTON

No. 17317

STATE OF HAWAII Plaintiff-Appellee, v. GLENN NAKATA, Defendant-Appellant.	)	CR. No. 90-1679
STATE OF HAWAII Plaintiff-Appellee, v. ALVIN K. L. LAU, Defendant-Appellant.	)	CR. No. 90-1657

No. 17228

JON DAVID WHITTINGTON, Petitioner, v. JAMES H. DANNENBERG, In his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and all other District Court Judges	)	Case Nos. of 5-4-93 DRIVING UNDER THE INFLUENCE OF INTOXICATNG LIQUOR (H.R.S., Sect, 291-4) SAFETY INSPECTION (H.R.S., Sect. 286-25)

of the State of Hawaii; STATE OF HAWAII, The real party in Interest, Respondents.	) POLICE REPORT NO.) 93-043370)) CERTIFICATE OF SERVICE)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached document shall be duly delivered to the following named party(ies):

	By: U.S. MAIL	HAND DELIVERY
TO: PROSECUTING ATTORNEYS OFFICE City and County of Honolulu 1060 Richards Street Ali'i Place, 9th Floor Honolulu, HI 96793	( )	( )

DATED: Honolulu, Hawaii, August 12, 1994.

/s/ Arthur E. Ross
ARTHUR E. ROSS
Attorney for Defendant-Appellants
GLENN NAKATA & ALVIN K.L. LAU

and Attorney for Petitioner
JON DAVID WHITTINGTON

Appendix "G"

IN THE DISTRICT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII	) Violation of Section 291-4
	)
Plaintiff,	) Hawaii Revised Statutes
	) (Driving Under the Influence)
v.	) HPD Report No. 093043368
	)
JON DAVID WHITTINGTON,	)
	) Violation of Section 286-25
Defendant.	) Hawaii Revised Statutes
	) (Safety Check)
	) HPD Report No. 093043380
	)

TRANSCRIPT

of proceedings had before the Honorable James H. Dannenberg, Judge Presiding, on Tuesday, the 4th of May, 1993:

APPEARANCES:

VINCENT BAAKE
Office of the Prosecuting Attorney
Deputy Prosecuting Attorney
1060 Richards Street
Honolulu, HI 96813

Appeared on behalf of the State of Hawaii

ARTHUR E. ROSS
1121 Nuuanu Avenue
Suite 203
Honolulu, HI 96817

Appeared on behalf of the Defendant

REPORTED BY:

. . .

MR. BAAKE: Cases 16 and 17A, Your Honor.

MR. ROSS: Art Ross appearing on behalf of Mr. Whittington, whose presence I have to ask the Court to waive. I had filed -- I believe that a jury demand had been filed.

THE COURT: It might have been. I don't -- I only have 16 and 17 on the calendar, and neither one is a DUI. The bailiff sheet lists five matters, including a DUI, but the calendar only lists two.

MR. ROSS: Something's obviously wrong, Your Honor. The cases weren't split.

THE COURT: An A-1, and A-2, a registration, a safety check--

MR. ROSS: Why does the bailiff's trial sheet got five counts, and not the calendar.

THE COURT: Well, actually though, they have a 291-47.

MR. BAAKE: Which--

THE COURT: That must be the--

MR. ROSS: That must be a mistake, huh?

THE COURT: ---291-4.

MR. BAAKE: That's been amended, Your Honor.

THE COURT: All right. Has it been? Oh, yes, I see. So that's the DUI. So all that I have here is a DUI and a safety check. That's what it is.

MR. ROSS: Well, there's supposed to be insurance too.

THE COURT: I wouldn't argue about it, if I were you.

MR. BAAKE: The no fault insurance, Your Honor, has been nolle prosequi'd, according to the file, as well as---

MR. ROSS: Probably got taken care of earlier.

MR. BAAKE: As well as the tax.

THE COURT: Okay. I take it this is a first offense, is that correct?

MR. ROSS: Yes, Your Honor.

THE COURT: Okay. Well, I -- as you heard me say---

MR. ROSS: However, we requested this before the governor signed any bill into an act. This is just proposed legislation. It's not fact yet. He could veto it.

THE COURT: He could. So we'll -- and if he does, then---

MR. ROSS: Well, you've got a court above you that's going to remand everything anyway, so---

THE COURT: Actually it isn't, from what I hear, so -- the cases are going to stay in limbo for a while.

Where is Mr. Whittington, do you know?

MR. ROSS: Well, generally speaking, when I make a jury demand, I don't tell people to come.

THE COURT: Right. I understand.

MR. ROSS: Now whether I get in trouble for it, that's a new matter. I mean -- I haven't up to now.

THE COURT: No, you haven't had notice, so I'm not going to hold you responsible for it. Let me ask this. Is that State ready?

MR. BAAKE: Yes, it is, Your Honor.

THE COURT: All right. What I'm going to do is this. I'm going to note the State's ready. I'll continue this. I'm going to, at

this point, deny the request for jury trial. I'm going to set it for trial.

If something happens that indicates that the new legislation isn't going into effect, you can always get the jury at that point. But, I don't see any harm or foul at this point, since you're not going to get a trial date until 1997 anyways, if you go to Circuit Court.

But as of this point, I think that the legislation is intended to apply retroactively. The new penalties will apply retroactively.

So you can make your arguments -- and I'll certainly give you an opportunity to write a memo by the next trial date to convince me otherwise. I'll probably be writing an opinion myself.

But at this point, since Mr. Whittington isn't here, and it's not his fault, we'll waive his presence on this one. We'll set it in the normal course for trial.

And you got to come next time prepared for trial as best you can. Do you have discovery, Mr. Ross?

MR. ROSS: I don't know. I haven't---

THE COURT: You might not.

MR. ROSS: It's been to a revocation, but I don't -- I haven't handled the case.

THE COURT: You might not. So I'll order the normal discovery to be made. You folks can talk about that.

But that's generally going to be the District Court's policy, as far as I know. And it will be my policy. So, just -- I'm sure we'll disseminate that, and make some more concrete policy changes.

But as of today -- but you know, you can always raise your arguments again the next time. But as of this point, we'll keep it until we know for sure.

So let Mr. Whittington know, and we'll continue it on that basis.

MR. ROSS: Okay.

CERTIFICATE

CITY & COUNTY OF HONOLULU)
)
STATE OF HAWAII)

I, MARILYNNE J GRILHO, Court Reporter, District Court of the First Circuit, State of Hawaii, do hereby certify that the foregoing is a true and correct transcript of the proceedings had before the Honorable James H. Dannenberg, Judge Presiding, on Tuesday, the 4th day of May, 1993.

Dated at Honolulu, Hawaii, this 11th day of May, 1993.

/s/ Marilynn J Grilho
Marilynne J Grilho, CSR#217

Appendix "H"

NO. 17317

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. GLENN NAKATA, Defendant-Appellant.	CR. NO. 90-1679
STATE OF HAWAII, Plaintiff, vs. ALVIN K. L. LAU, Defendant-Appellant.	CR. NO. 90-1657
STATE OF HAWAII, Plaintiff, vs. EDDIE DAOANG, Defendant-Appellant.	CR. NO. 90-1838

OPENING BRIEF OF APPELLANTS GLENN NAKATA AND ALVIN K. L. LAU

STATEMENT OF RELATED CASES

APPENDICES A - C

CERTIFICATE OF SERVICE

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NO. 17317

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. GLENN NAKATA, Defendant-Appellant.	CR. NO. 90-1679
STATE OF HAWAII, Plaintiff, vs. ALVIN K. L. LAU, Defendant-Appellant.	CR. NO. 90-1657
STATE OF HAWAII, Plaintiff, vs. EDDIE DAOANG, Defendant-Appellant.	CR. NO. 90-1838

I.

STATEMENT OF JURISDICTION

DEFENDANTS-APPELLANTS GLENN NAKATA and ALVIN K. L. LAU (hereinafter "Appellants"), were arrested and charged with the offense of driving under the influence of intoxicating liquor (hereinafter "DUI"), in violation of Section 291-4 of the Hawaii Revised Statutes (hereinafter "HRS"), prior to May 21, 1993. Both Appellants were released from custody having posted bail in the amount of $150.00.

Upon arraignment in the District Court, each of Appellants requested to be tried by jury and both cases were transferred to Circuit Court. Due to court congestion, Appellants' cases were still pending on May 21, 1993, when the new legislation clarifying the sentencing provisions for first and second time DUI offenders went into effect. The reduction in penalty from thirty (30) to five (5) days for first offenders was a major portion of Act 128 (H.B. 747), which declares that first time DUI offenders are not entitled to jury trials. (See Appendix "A" attached hereto.)

On June 25, 1993, the prosecution filed motions in the

Circuit Court of the First Circuit, State of Hawaii, requesting that the Court remand three pending DUI cases to the District Court for trial without a jury. A Stipulation of Facts, along with memoranda in support and in opposition to the motions were filed with the Circuit Court and a hearing was conducted on July 29, 1993. Findings of Fact (hereinafter "F. F") were made by the Court and filed on July 30, 1993.

Believing that there were important and far reaching constitutional questions that were presented, the Honorable Dexter D. Del Rosario, Judge of the First Circuit Court, pursuant to § 603-21.9 H.R.S. and Rule 15 of the Hawaii Rules of Appellate Procedure (hereinafter "HRAP"), ordered that two questions be reserved for consideration by the Hawaii appellate courts.

Upon consideration of the Order Reserving Questions of Law pursuant to Rule 15 of HRAP, the Supreme Court of the State of Hawaii, without conclusively determining whether this court will answer the reserved questions, filed an order on August 18, 1993, designating the Defendants as Appellants and directing them to file an Opening Brief within twenty (20) days or no later

than September 7, 1993, and directing the State as Appellee to file an Answering Br[illegible] within twenty (20) days after the service of the Opening Brief.

The Hawaii Supreme Court has jurisdiction to entertain the Order Reserving Questions of Law, pursuant to Rule 15, HRAP and HRS § 602-5(2) (1985 and 1990 (Supp)).

II.

STATEMENT OF THE CASE

Appellants GLENN NAKATA and ALVIN K. L. LAU were arrested on June 10 and July 30, 1990, respectively, and charged with the offense of Driving Under the Influence of Intoxicating Liquor, in violation of HRS § 291-4. This was their first offense. (F. F. Nos. 1, 2.) Upon arraignment in the District Court in August of 1990, in reliance on the holding of State of Hawaii v. O'Brien, 5 Haw. App. 704 P.2d 905 (1985) aff'd, 68 Haw. 38, 704 P2d 883 (1986)[1], Appellants exercised their rights

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[1] In State v. O'Brien, id 68 Haw. at 42, this Court held that DUI is a "serious" offense, entitling those charged to be tried by a jury. The O'Brien court found that even though the statutory penalty provided in H.R.S. §291-4 did not exceed 6 months, the mix of punishments which

[Footnote continued on next page]

and demanded a jury trial. These requests resulted in both cases being transferred to the Circuit Court. (F. F. No. 2.) However, due to court congestion, Appellants' cases were still pending trial when the new legislation reducing the maximum jail sentence to five (5) days for first offenders became effective, on May 21, 1993. (F. F. No. 6.) Prior to May 21, 1993, the maximum sentence for first offenders was thirty (30) days and at the time both Appellants were arrested, the maximum jail term for first and second DUI offenders was 180 days.

On June 25, 1993, the prosecution filed three motions in the Circuit Court requesting the remand of three (3) pending DUI cases to the District Court for a bench trial.[2] Hearing on the motion was held on July 30, 1993, following which the trial court filed Findings of Fact and Reserved Questions of Law. The following are findings pertinent to Appellants Nakata's and Lau's

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apply once a driver has been found guilty reflect the opprobrium which the community views such activity and classified DUI as a serious offense.

[2] The third case involves Eddie Daoang who is represented by Theodore Chinn, Public Defender, in this matter.

cases.

The Court took judicial notice of the fact that there had been jury trials in the Circuit Court subsequent to May 21, 1993 for Appellants who were arrested and charged for offenses occurring both subsequent and prior to Appellant's arrest. (F. F. Nos. 7 and 11.)

The trial court also found the following collateral consequences for a person convicted of DUI. An individual convicted of DUI must comply with the financial responsibility requirement under H.R.S. §287-20 (F. F. Nos. 9 and 10.) There are four ways in which this requirement may be met: (1) Proof of insurance via Form SR-22, (2) Posting a bond in accordance with the Act, (3) Depositing money or securities in the amount of $25,000, or (4) submitting a self-insurance certificate under H.R.S. §287-22. (F. F. No. 18b.) The requirement exists for a three year period and non-compliance will result in the individual's license suspended for three years or until compliance. (F. F. Nos. 18b and f.) Approximately 65% of the individuals who comply with the requirement elect to do so by way of SR-22, proof of insurance.

(F. F. No. 18c.) The insurance rate for the individual with a clean driving record who is convicted of DUI will see an increase between 7 to 8 times the existing insurance premium. (F. F. No. 19a, b, and c.) The average insurance rate charged for a Toyota Camry for a person with a clean driving record is approximately $1,086 for a year. The same coverage for a person convicted of DUI would cost $7,913 for a year. (F. F. No. 19.)

House Bill No. 747 was the vehicle by which the amendments to H.R.S. §291-4 (1985) were made. (See Act 128, Appendix "A"). Governor Waihee signed into Law Act 128 on May 21, 1993. The legislature through Act 128 clearly expresses itself by stating that:

> "It is the intent of the legislature that individuals charged with the offense of driving under the influence of intoxicating liquor as a first time offender shall not be entitled to a jury trial." (See Appendix "A".)

On July 30, 1993, the trial court filed an Order reserving questions of law for decision by the Hawaii Supreme Court.

III.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the amendments to the sentencing provisions of HRS § 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session on 1993, effective May 21, 1993, eliminate the right to jury trial for defendants charged with a first offense under HRS § 291-4.

2. If the amendments to the sentencing provisions of HRS § 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, do eliminate the right to jury trial, whether the deprivation of such a right may be applied retrospectively to alleged offenses occurring prior to the enactment of the Act.

IV.

ARGUMENT

A. THE AMENDMENT TO THE SENTENCING PROVISIONS OF HRS § 291-4 PROVIDED IN ACT 128, S.L.H. 1993 DOES NOT ELIMINATE THE RIGHT TO A JURY TRIAL FOR DEFENDANTS CHARGED WITH A FIRST DUI OFFENSE AS THE OFFENSE IS STILL CONSTITUTIONALLY "SERIOUS".

1. UNDER THE HAWAII CONSTITUTION, DUI IS A "SERIOUS" CRIME WHICH ENTITLES AN ACCUSED TO A JURY TRIAL

The right to a jury trial in a criminal case is guaranteed by the Sixth Amendment of the Constitution of the United States of America and that guarantee is extended to the States by the Fourteenth Amendment to that document. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L.Ed 2d 491, reh'g denied, 392 U.S. 497, 88 S. Ct. 2270, 20 L. Ed. 2d 1412 (1968). Explaining why the right to trial by jury is fundamental, Justice White wrote:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice

> administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too strong to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the Defendant preferred the common-sense judgement of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Duncan, 391 U.S. at 155 - 156, 88 S. Ct. at 1451.

However, this right extends only to offenses which are of a serious nature and persons who are charged with a petty offense are not entitled to a jury trial under the Federal Constitution. Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L.Ed.2d 437 (1970); Callan v. Wilson , 127 U.S. 540, 8 S.Ct. 1801, 32 L. Ed. 223 (1888); District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930); and Cheff v. Schnackenberg,

384 U.S. 373, 86 S. Ct. 1523, 16 L.Ed.2d 629 (1966). This principle applies to the Constitution of the State of Hawaii as well. State v. Shak, 51 Haw. 612, 466 P.2d 422, cert. denied 400 U.S. 930, 91 S.Ct. 191, 27 L.Ed.2d 190 (1970); and State v. Kasprzycki, 64 Haw. 374, 641 P.2d 978 (1982).

In determining what is a "serious" crime, which entitles a defendant to a jury trial, the federal courts along with some state courts, look primarily to the length of the sentence which can be imposed. If the sentence exceeds six months, then the crime is of a "serious" nature and a jury trial attaches. If the sentence does not exceed six months, then the crime is considered petty and a jury trial is not required. Baldwin v. New York, supra; Blanton v. North Las Vegas, 489 U.S. 538, 190 S. Ct. 1289, 103 L.Ed. 550 (1989). But there is no flat rule that there is no right to a jury trial where the possible sentence is less than six months.

In many jurisdictions, Hawaii included, the length of the sentence is only one of the factors to be considered. See discussion in Notes, Jury Trial Right for DWI, 73 Minn. L. Rev. 122, 131-154 (1988). Other factors are collateral consequences, i.e.

the nature of any other form of punishment which is legislatively authorized for the offense is to be taken into account in determining whether the offense is sufficiently serious that the right to a jury trial applies. State v. O'Brien, 5 Haw. App. 491, 704 P.2d 905 (1985), aff'd 68 Haw. 38, 704 P.2d 383 (1986); State v. Jordan, 72 Haw. 597, 825 P.2d 1025 (1992); United States v. Coppins, 953 F.2d 86 (4th Cir. 1991); and United States v. Craner, 652 F.2d 23 (9th Cir. 1981).[3]

Upon finding the statutory penalty did not exceed six months,[4] the Hawaii Supreme Court in State v. O'Brien, supra, departed from the Baldwin criteria. Id. 68 Haw. at 44-45. The Court assessed the statutory scheme; noted that the threat of the loss of the driver's license for a specific period of time reflected that the community did not view DUI as a petty offense, and held that it

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[3] In Craner, the Court looked to the relevant state and federal practice pointing out that "[at least seven of the states in this Circuit guarantee the DUI defendant the right to a jury trial. Id: 652 F.2d at 27. Only Nevada denies the right to a jury trial in DUI cases.

[4] At the time of the O'Brien decision, the 180 day maximum DUI penalty was less than six months by statute. See H.R.S. §1 - 20. An unrelated penal code amendment in 1987, however, made 180 days equivalent to six months. See H.R.S. §706-600.5(2).

was to be considered a serious offense.[5]

Four years after O'Brien, the U.S. Supreme Court in Blanton v. North Las Vegas, supra; also departed from the criteria it applied in earlier decisions. In Blanton, the Court stated that "[I]n using the word 'penalty', we do not refer solely to the maximum prison term authorized for a particular offense." A Legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense. Id. 489 U.S. at 542. The Court continued "[W]e thus examine 'whether the length of the authorized term or the seriousness of other punishment is enough in itself to require a jury trial.' " [Emphasis in original]. See Annot. Petty and Serious Offenses, 103 L.Ed.2d 1000, 1002 - 1003; 1012 - 1013. See also Project, Criminal Procedure, 78 Georgetown L. J. 1077, 1105 (1990).

In Hawaii, the factors to be considered are: (1) historically, was the offense one triable to a jury at common law;

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[5] It should be pointed out that the author of the article in the Minnesota Law Review commented that O'Brien was one of the two cases with "the best examinations of the variety of statutory penalties imposed upon the DUI defendant". 73 Minn. L. Rev. at 150, N. 183.

(2) the gravity of the offense; (3) the collateral consequences of the authorized punishment; and (4) the length of the maximum jail time that can be imposed. State v. O'Brien, supra; State v. Jordan, 27 Haw. 597 825 P.2d 1025 (1992). In Jordan, decided three years after Blanton, the Court reviewed these factors again and found that the mere reduction of the maximum jail sentence that can be imposed is not enough to overcome the other factors delineated in O'Brien which entitle Appellants to a jury trial. Moreover, the recent appointment of the Honorable Allene Richardson to the District Court bench again focused attention on the seriousness of the DUI offense which was expounded upon by the Honolulu Star Bulletin. (See Exhibit "B".) Sixty eight percent (68%) of the people polled felt that an individual should not be appointed to a judgeship while a D.U.I. charge is pending. This high percentage clearly demonstrates the social stigma that attaches to just the DUI arrest itself, without ever having been convicted.

The doctrine of "petty offense" is one of federal constitutional law which does not prevent the States or the Federal Government from granting a jury trial in petty offenses; it speaks

only to when the United States Constitution mandates such a right. Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988).

(a) HISTORICALLY, DRIVING UNDER THE INFLUENCE IS TRIABLE TO A JURY.

In State v. O'Brien, 5 Haw. App. 491, 704 P.2d 905, the Intermediate Court of Appeals found that driving a motor vehicle while intoxicated was very much like the common law offense of reckless driving. Reckless driving under common law was an indictable offense, and a defendant so charged was entitled to a trial by jury; Id., citing District of Columbia v. Colts, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177; and therefore, the first criterion is met for finding that driving under the influence is a "serious offense, which requires a jury trial. This was reaffirmed in State v. Jordan, supra; which also dealt with the Legislature's attempt to overcome the "serious" nature of the DUI offense by reducing the maximum jail time for a first time offender from six months to 30 days. Nonetheless, this Court found that reduction of sentence alone was insufficient to overcome the seriousness of the crime and

the attached right to jury trial, since the whole picture must be examined and not just the single element of maximum jail time. Id. at 600-601.

(b) DRIVING UNDER THE INFLUENCE IS A GRAVE OFFENSE WHICH IS TRIABLE TO A JURY

In State v. O'Brien, 5 Haw. App. 491, 704 P.2d 905, the Intermediate Court of Appeals examined the history of Hawaii's laws dealing with driving under the influence. Based upon its examination, the Court found that driving under the influence (DUI) is a crime of grave nature. Id. at 500 - 502.

Since the publication of that decision, the Hawaii State Legislature has been heavily involved in "tampering" with the severity of the sentence for DUI offenders. In 1990, the Legislature adopted an administrative revocation law because it found that the safety of Hawaii's citizens was put in serious jeopardy by drunk drivers.[6] In making that finding, the Legislature did not distinguish between drivers who were charged with driving under the influence for the first time and those drunk drivers, who had one or more

[6] Part XIV, Chapter 286 H.R.S., L1990, C188.

convictions.

In the next session of the Legislature, (1991) the administrative revocation law was amended again.[7] After that "session ended", a special session of the Legislature was called to deal with the problem.[8]

Clearly this proves that the Legislature still believes that driving under the influence is a grave matter. Therefore, the second criterion is established for finding that driving under the influence is a "serious" offense, which entitles an accused to a jury trial.

(c) THE COLLATERAL CONSEQUENCES OF THE AUTHORIZED PUNISHMENT FOR DRIVING UNDER THE INFLUENCE ENTITLE APPELLANTS TO A TRIAL BY JURY.

Under H.R.S. §286-251 et seq., a first time offender's driver's license is revoked for ninety days. For the first thirty days of that suspension, the suspension is absolute and for the next sixty

[7] L1991, C300.

[8] AM L.Sp 1991, C1. This law went into effect on August 1, 1991.

days a conditional permit may be issued allowing the driver to drive only to and from work, for work related purposes and for alcohol abuse classes, as the case may be.

At the end of the ninety day suspension period, the driver's license of a first time offender is not automatically returned. The driver is required to report to a certified substance abuse counselor for an assessment of alcohol abuse or dependence and to obtain treatment at his or her own expense if needed. Further, the driver must attend fourteen (14) hours of counter-attack classes[9] and must show proof of financial responsibility by filing a notice to that effect, i.e., file an SR-22 form. See, H.R.S. §287-20 which mandates that persons convicted of DUI must comply with the financial responsibility requirements of the Motor Vehicle Safety Responsibility Act. (F. F. Nos. 9 and 10). Finally, after completing the foregoing, the driver must obtain a clearance from the Administrative Driver's License Revocation Office indicating

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[9] H.R.S. §291-4(b)(1)(A). In a recent habeas corpus decision from the 9th Circuit Court of Appeals, Dow v. Circuit Court of the First Circuit, 995 F.2d 922 (9th Cir. 1993), the Court held that compulsory attendance at counterattack classes is the equivalent of "custody" in a constitutional sense, lending further support to the view that DUI is a serious offense.

that there has been compliance with all requirements. Only then can the driver apply for a license by taking new written and driving tests. Failure to comply with these statutory requirements results in license suspension for three years.

Under Hawaii law, drivers who are convicted of driving under the influence are placed in a high risk category. Once a driver is placed in the high risk category, his premiums are increased anywhere from four hundred to one thousand percent. (See Appendix "C").

The collateral consequences are such that a first time offender is likely to be punished for a period longer than the mandatory administrative suspension due to exorbitant increases in insurance premiums. In addition, to the administrative mandatory suspension, the driver still faces the consequences of a criminal proceeding arising from the same event. Therefore, the third criterion is established for finding that driving under the influence is a "serious offense" which requires a jury trial. State v. O'Brien, supra; State v. Jordan, supra; United States v. Craner, supra; United States v. Coppins, supra; and United States v. Woods, 450 F. Supp.

1335 (D.C. Md. 1978).

(d) THE MAXIMUM LENGTH OF JAIL TIME THAT CAN BE IMPOSED UPON A FIRST OFFENDER FOR DRIVING UNDER THE INFLUENCE HAS NO EFFECT ON THE RIGHT TO A JURY TRIAL IN HAWAII.

Under the previous law, [10] the maximum jail time for a first time DUI offender was thirty days. The possibility of thirty days imprisonment was well below a six month jail term which would have required a jury trial per se, and yet, a first time offender, under the prior statute, had the right to be tried by a jury. State v. Jordan, supra.

The length of the jail sentence for a driver, who is charged with DUI for the first time, is not a controlling or even a significant factor in determining whether that driver is entitled to a jury trial. Therefore, the reduction of the amount of jail time a first offender is exposed to does not take away his right to a jury trial. State v. O'Brien, supra.

It is clear that the conviction of a first time offender has serious consequences. Therefore, any first time offender

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[10] H.R.S. §294-4(c)(iii).

charged with DUI is constitutionally entitled to a jury trial notwithstanding the fact that the exposure to jail time does not exceed six months. Id; Opinion of the Justices (DWI Jury Trials), 608 A.2d 202 (N.H 1992); United States v. Craner, supra; United States v. Woods, supra; Brown v. Multnomah County District Court, 280 Or. 85, 570 P.2d 52 (1977); Brady v. Blair, 427 F. Supp. 5 (S.D. Ohio E.D. 1976); Parham v. Municipal Court in and for the City of Sioux Falls, 86 S. D. 531, 199 N.W.2d 501 (1972); Baker v. Fairbanks, 471 P.2d 386 (Alaska, 1970); and Rothweiler v. Superior Court of Pima County, 100 Ariz. 37, 410 P.2d 479 (1966).

B. THE LEGISLATIVE INTENT EXPRESSED IN ACT 128, S.L.H. 1993 IS CONTRADICTORY TO THE PREAMBLE OF ACT 188, S.L.H. 1990, IS WITHOUT SUBSTANCE AND IS CONSTITUTIONALLY SUSPECT.

The legislative declaration which accompanied the passage of Act 128, S.L.H. 1993 is constitutionally suspect since it is void of any substance and is in total conflict with the legislative intent expressed in Act 188, S.L.H. 1990 (Administrative Driver's

License Revocation law). The preamble to Act 188, S.L. H. 1990 states:

> SECTION 2. Too many traffic fatalities and injuries are caused by drunk drivers in Hawaii despite the stiff criminal penalties for driving under the influence of alcohol provided in section 291-4 of the Hawaii Revised Statutes. Even with vigorous enforcement by county police and prosecutors, alcohol related driving offenses and injuries continue to increase while, ironically, guilty parties, including the most serious repeat offenders, go on driving until they are found guilty in a court of law. Since criminal prosecution may take several months longer due to crowded court calendars and other factors, dangerous and irresponsible drivers, who have been caught and arrested, continue to jeopardize our citizenry while awaiting trial. Accordingly, the legislature finds that driving under the influence of alcohol poses a very real and serious danger to the safety and welfare of the people of this State and requires stronger measures to ensure that people who drink do not drive and that those who do are taken off the road promptly.

Since the Administrative Revocation law, Part XIV, Chapter 286 of the Hawaii Revised Statutes has not been changed or rescinded, it is clear that the Legislature still considers DUI a very grave and serious offense. Although the maximum jail term has been clarified in Act 128, S.L.H. 1993, to five and sixty days for first and second offenders, the mix of punishments set forth in

the penalty provisions of H.R.S. §291-4 and 287-20 were not reduced by the amendments. In fact, the severity of penalties has increased since the O'Brien decision with the additional provisions for administrative revocation of driver's license and the requirement that the jail term for a third offense must be 48 consecutive hours of imprisonment. Thus, the mix of punishments, as amended by Acts 188, S.L.H. 1990 and Act 128, S.L.H. 1993, imposed on the DUI offender reflect the opprobrium with which the people of Hawaii still view such activity so that DUI cannot be considered a petty offense. O'Brien, supra.

Under the amended version of H.R.S. §291-4, a second offender is subject to a maximum jail term of 60 days, well below the six month line of demarcation set in Baldwin v. New York, supra. Nonetheless, the Legislature considers a repeat offender dangerous enough to retain the right to jury trial. In view of the inconsistent approach taken in Act 128, it is apparent that the Legislature was concerned solely with the backlog of pending DUI jury trials rather than following the constitutional criteria for downgrading the offense. If DUI was truly a petty offense as Act

128 declares, the first offender should have been afforded either a deferred acceptance of guilty plea or relief from H.R.S. §287-20 so that the impact of such exorbitant increases in insurance premiums could be eliminated or prevented.

It is common knowledge that over 20% of the motorists on Oahu are driving without a valid license and/or current no-fault insurance coverage due to the onerous insurance premiums that are mandated by State action under H.R.S. §287-20, many as a direct consequence of being convicted under H.R.S. §291-4. The strongest evidence that the amendment contained in Act 128 is constitutionally suspect is the Legislature's failure to make any changes to the Administrative Driver's License Revocation law which was enacted at a Special Session in 1991 following a huge lobbying effort by the Attorney General and Mother's Against Drunk Driving (MADD) to get the drinking drivers off the road promptly as they represent a serious danger to the safety and welfare of the people of this State. See the preamble to Act 188, S.L.H. 1990.

The 1993 amendment affected only one of the three

major factors which this Court in O'Brien used to determine that DUI is a constitutionally serious offense. Clearly, the first factor which analogized DUI to the offense of reckless driving is not affected. And, as pointed out above the Legislature still considers DUI a very grave and serious offense, despite the clarification as to the maximum period of incarceration for first offenders.

For these reasons, the legislative intent expressed in Act 128 should carry no weight in any determination whether the offense of DUI is still constitutionally "serious" so as to deny a defendant his or her right to a jury trial.

C. THE AMENDMENT TO H.R.S. 291-4 SEEKS TO ARBITRARILY AND UNFAIRLY TAKE AWAY DEFENDANTS' VESTED RIGHT TO JURY TRIAL.

A retroactive or retrospective law, inter alia, is one that takes away or impairs vested rights acquired under existing laws.[11] Emp. Ret. System v. Chang et al, 42 Haw. 532, 535-536

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[11] There is no difference in principle between a retrospective law and a retroactive law, either of which is one which takes away or impairs vested rights acquired under a different law ....: Roe v. Doe, 59 Haw. 259, 263, 581 P.2d 310 (1978).

(1958); 82 C.J.S. Statutes, §412 p. 980.

In Chang, supra; this Court looked to the following for guidance:

> ... [B]efore discussing the intent and purpose of the legislature in passing the Act, and the proper interpretation of the statute, we shall briefly touch upon the constitutionality of the Act as a "retrospective law." Mr. Justice Story's definition has become a classic and is as follows: "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." (2 Story, Constitution, §1398.)

The disability to the transactions already past in the present case deals with the usurpation of a vested right to trial by jury which was demanded prior in time.

It has been held that a right to trial by jury is a "substantive right", and thus an amendment eliminating the right to a jury trial for an offense committed prior to the effective date of the amendment is Constitutionally suspect, even where the violation only involves speeding. State v. Chapman, 814 P.2d 449 (Kan. App. 1991).

Appellant's right to a jury trial is both a substantive right and a right that has been vested. The right to a jury trial once granted is substantive as opposed to procedural. The Ohio Supreme Court appropriately has stated: "[T]he right to a jury trial does not involve merely a question of procedure. The right to jury trial derives from Magna Charta. It is reasserted both in the Constitution of the United States and the Constitution of the State of Ohio. For centuries, it has been held that the right of trial by jury is a fundamental right, a substantial right, and not a procedural privilege. [citing] Martin v. Winsor Hotel Co., 70 N.Y. 101. Cleveland Railway Co. v. Halliday, 188 NE 1 (Ohio 1993). See also, Dyer v. Keefe, 198 A2d 159 at 161-162 (Rhode Island 1964); Hardamon v. Municipal Court in and for City of Boulder, 497 P.2d 100 at 1002 (Colorado 1972); State ex rel. Weber v. Municipal Court, 567 P.2d 688 at 709 (Wyo. 1977, Justice Rose dissenting); Campbell v. State, 344 SE2d 745, at 747 (Ga. App. 1986).

Appellants' right to a jury trial also became vested when they chose to be tried by a jury and their cases thereafter were transferred to the Circuit Court. A "vested right" -- is a right

under which particular circumstances will be protected from legislative interference. 2 Singer, Statutes & Statutory Construction (Sands 4th Ed., 1986 Rev.) §41.05, pp. 365-366; §41.06, p. 375;) (hereinafter "Singer"). It is a "present fixed interest which in right reason and natural justice should be protected against arbitrary state action...." *Id.* It is a legal right acquired by an individual under the laws previously existing which is secure against any act of the legislature. *See* Article, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 232, 246 (1927). It has also been said a party cannot be divested of a vested right by a retrospective act where the person has changed his position in reliance upon the existing law or the new legislation defeats the person's reasonable expectations. See Hochman, Retroactive Legislation, 73 Harv. L. Rev. 692, 696 (1960).

At the time Appellants were charged with the DUI offense, they were entitled to a jury trial by reason of the holding of the Hawaii Supreme Court in State v. O'Brien, 68 Haw. 38, 304 P.2d 833 (1985). Upon arraignment, Appellants were afforded the opportunity of either a bench or jury trial; they elected to be tried

by a jury and, as a result, their cases were transferred to the Circuit Court. But for the fact of a congested court calendar, Appellants by this time would have had their trial by a jury; now, however, through no fault of their own, the prosecution and courts are arbitrarily and unfairly seeking to take away Appellants' right to be tried by a jury upon which they had reasonably relied and thereafter acted upon.

D. DEPRIVING THE DEFENDANTS OF THEIR ALREADY VESTED RIGHT TO JURY TRIAL VIOLATES DUE PROCESS OF LAW.

Act 128 of the 1993 Hawaii State Legislature applied retrospectively cannot strip Appellants' already accused of DUI of their vested right to a jury trial without violating due process of law.

Both the federal and state constitutions provide that "no person shall be deprived of life, liberty, or property, without due process of law."[12] To deprive the Appellants of their right to

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[12] The due process clauses in the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I §5 of the Hawaii Constitution are

[Footnote continued on next page]

a jury trial at which time they acquired this right they legally were entitled, is to deprive the Appellants of their constitutional right to due process of law.

Authorities recognize that the ex post facto clause in the U. S. Constitution is not logically necessary for the due process clause can accomplish the same result as the ex post facto clause by providing procedural safeguards to those accused of a crime.[13] See *Nowak, Rotunda & Young, Constitutional Law* (2d ed. 1983) ch. 13 pp. 471-472; *Hochman Retroactive Legislation*, 73 Harv. L. Rev. 692, 693-694 (1960); *Slawson, Retroactive Lawmaking*, 48 Calif. L. Rev. 216, 222 (1960). Article, *Retroactive Laws and Vested Rights*, 5 Tex. L. Rev. 231, 234-235 (1923). Most appropriate and applicable in the instant proceeding is the statement by the Hawaii

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identical. The Fifth Amendment of the U.S. Constitution provides in part that "... nor shall any person ... be deprived of life, liberty or property without due process of law...." The Fourteenth Amendment of the U.S. Constitution similarly provides in part that "...[n]o State shall ... deprive any person of life, liberty or property without due process of law ..." And Article 1, §5 of the Hawaii State constitution provides in part that [n]o person shall be deprived of life, liberty, or property without due process of law.

[13] This argument is made in part in anticipation and preemption of the State's reliance on Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30, 37 (1990).

Supreme Court in State v. Huelsman, 60 Haw. 71, 588 P.2d 394 (1978) that "'[t]he touchstone of due process is protection of the individual against arbitrary action of the government.'" *Id.* at 88.

With the progressive expansion of the due process protection in criminal cases (See, e.g., *State v. Huelsman*, id, 60 Haw. at 87. LaFave & Israel, Criminal Procedure, §2.1, pp. 33-34; §2.7, pp. 60 - 62 (1985)), and the broadening of the definitions of "liberty" and "property" afforded protection under the due process clause, there is no question but that Appellant's vested right to a jury trial falls within the meaning of both protected rights -- "liberty" and "property".

The term "liberty" no longer is limited to freedom from bodily restraint, but encompasses any interest of freedom of action or choice created by the state or constitution which must be protected from arbitrary government interference. See, Board of Regents v. Roth, 408 U.S. 564, 572-574, 33 L. Ed. 2d 548, 558, 559 (1972); Nowak, Rotunda & Young, Constitutional Law (2d ed. 1983) ch. 15, pp. 533-534; 539-545. See also, *Monaghan, of "Liberty" and "Property"*, 62 Cornell L. Rev. 405, 411-416 (1977).

In Appellants' cases, at the time they were arraigned on a DUI charge, the state through its highest Court recognized that they were entitled to be tried by jury for that offense. Having been afforded the right to a jury, Appellants opted for a jury trial. Should their cases be remanded to the District Court, their choice for a jury trial arbitrarily is eliminated -- such arbitrary action is violative of their constitutional right to due process. Although relying on the State's due process clause, the California Supreme Court in People v. Ramirez, 158 Cal. Rptr, 316 (1979), stated that "freedom from arbitrary adjudicative procedures is a substantive element of one's liberty." *Id.* at 320.

The meaning of the term "property" as used in the due process clauses also has been broadened. The U. S. Supreme Court in Roth stated that the property interests are not those created by the constitution, *Id.*, "[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law ..." Board of Regents v. Roth, *Id.*, 408 U.S. at 577. The Hawaii Supreme Court in O'Brien, supra; created an interest, i.e., the right to a jury trial for a DUI

charge, which as a substantive right, falls within the meaning of a protected "property" right under the due process clause.

A vested right as defined above, in various circumstances has been equated with the meaning of "property" to qualify it for protection from the arbitrary interference under the due process clause. Singer, supra; 41.06, O, 376. The California Supreme Court cogently points out that "a vested right, as that term is used in relation to constitutional guarantees, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived of arbitrarily without injustice." Miller v. McKenna, 147 P.2d 531, 536 (1944). One can only conclude that the abrogation of Appellants' substantive and vested right -- the right to a jury trial for a DUI charge, would be violative of due process of law. That is, Appellants' "liberty" would be infringed upon by the arbitrary act of the Court in remanding their cases to the District Court to be tried without a jury; and their "property" right, the vested right to a jury trial, would also arbitrarily be extinguished.

E. BLANTON V. NORTH LAS VEGAS IS

NOT CONTROLLING AUTHORITY IN HAWAII AS THE PRESUMPTION THAT DUI IS A PETTY OFFENSE IS OVERCOME BY THE SEVERE STATUTORY PENALTY IMPOSED BY H.R.S. §287-20.

The U. S. Supreme Court in Baldwin v. New York, 399 U.S. 66, 69, (1970), established a "bright line" rule of six months between serious and petty offenses. However, the Court has not adopted a firm rule automatically deeming an offense to be "petty" if it carries a maximum jail term of less than six months. Blanton v. North Las Vegas, 489 U.S. 538, 543, 103 L.Ed.2d 550, 556, (1989). Instead, the Supreme Court would "presume for purposes of the Sixth Amendment that society views such an offense as "petty." Id. 489 U.S. at 543-544. However, a defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. 489 U.S. at 544.

In Blanton, the Court merely upheld the lower court's

(U.S. District Court) determination that the Nevada Legislature had not clearly indicated that DUI is a "serious" offense. It is to be noted that the Nevada statutory scheme, unlike Hawaii, does not require a person convicted of DUI to post a bond or provide proof of financial responsibility before reapplying for a license. The Supreme Court in Blanton said that in order to determine whether the Sixth Amendment right to a jury trial attaches to a particular offense, the Court must examine "objective indications of the seriousness with which society regards the offense." Blanton, 489 U.S. at 541.

In O'Brien this Court had already recognized that the United States Constitution did not require a jury trial in DUI cases based upon sentencing considerations.

> While the terms of imprisonment for a DUI conviction do not exceed six (6) months and therefore do not trigger the requirement for a jury trial as contemplated by the United States Supreme Court cases such as Baldwin, supra; the mix of punishments which apply once a driver has been found guilty of drunk driving reflect the opprobrium with which the people of this State view such activity.
> State v. O'Brien, supra; 68 Haw. at 44.

This Court was faced with the identical issue in State

v. O'Brien, supra; which decision preceded Blanton. Although O'Brien was decided without the benefit of Blanton, the Hawaii Court adopted a more liberal view in determining whether an offense was considered serious or petty. The Hawaii Court had noted that federal decisions on this question will serve as a guide but would not dictate the interpretation of the constitutional right to jury trial under the Hawaii Constitution. O'Brien, 68 Haw. at 41, 704 P.2d at 885. Thus, the Hawaii Supreme Court applied the following criteria in deciding that the offense of DUI is constitutionally "serious", such that a person charged with the offense is accorded the right to jury trial:

> As the ICA outlined in its opinion below, several approaches have traditionally been used to determine whether an offense is petty or serious. The reported cases have looked first to the traditional treatment of the offense at issue, and ask whether the particular violation of the law is one which was "indictable at common law" or "tried summarily without a jury." In addition, the authorities look to the gravity of an alleged offense, asking whether it affects the public at large, reflects moral delinquency, or carries sufficient opprobrium to require its being labeled a serious violation of the law.
>
> State v. O'Brien, 68 Haw. at 42, 704 P.2d at 886.

This Court's precedents in O'Brien and Jordan are at variance with the Supreme Court's opinion in Blanton, and in light of the criteria set forth therein, the May 21, 1993 amendment to H.R.S. §291-4 does not affect the classification of a DUI as a serious offense. As pointed out above, there is no controlling legislative determination regarding the seriousness of the offense.

Moreover, when comparing the maximum prison term of five days with the extreme financial burden (insurance increases in excess of $20,000) placed on a first time offender coupled with a potential three year loss of license, it appears that the Legislature still regards DUI as a serious offense contrary to its declaration in Act 128.

The additional penalties imposed under the Hawaii statutes are sufficiently severe to overcome the Blanton presumption that a maximum jail term of five (5) days is petty. The administrative revocation law provides that criminal prosecution under H.R.S. §291-4 may be commenced concurrently with the revocation proceedings. H.R.S. §286-253. However, enactment of the administrative revocation legislation to more expeditiously

revoke the driver's license reinforced the characterization that a DUI criminal proceeding is considered a serious offense which entitles the accused to a jury trial. How the State regards the offense as to whether it is serious or petty is one criteria to be used as a guide. United States v. Jenkins, 78 F.2d 473, 473-475 (4th Cir. 1986). The expression of the Legislature's opinion in the preamble to Act 188 reflects that Hawaii viewed DUI as a serious offense, and Act 128, S.L.H. 1993 does not affect that characterization.

This Court should defer to the Legislature's opinion that the drunk driver poses a very real and serious danger to the general public. An even more exacting penalty is the requirement of proof of financial responsibility pursuant to H.R.S. §287-20 for a DUI conviction. Even if viewed as a collateral consequence, the exorbitant increase in automobile insurance rates upon the conviction of a DUI offense is a significant factor in determining the seriousness of a DUI offense. United States v. Jenkins, supra.

It is ironic that a party to a civil suit may enjoy the right to a jury trial when the dollar amount claimed exceeds $5,000,

H.R.S. §604-5(b), Hawaii State Constitution, Article I. Section 13, yet the State wishes to eliminate a DUI Appellant's right to a jury trial where the realistic consequences of increased high risk insurance rates (mandated by H.R.S. §287-20) exceed by more than $15,000 the threshold dollar amount for a civil jury trial.

This is the rare case where a "Legislature packs an offense it deems "serious" with onerous penalties that nonetheless do not puncture the six months incarceration line." Blanton, 489 U.S. at 543, 103 L. Ed.2d. at 556. Here, the DUI offense carries as a statutory penalty an increase in insurance premiums in excess of $20,000 or the loss of license for three years which "approximates in severity the loss of liberty that a prison term (5 days) entails." Id. at 542. This monetary penalty is in many cases far more intrusive and a greater infringement on liberty than incarceration for five days. Ibid.

This case should not be controlled by Blanton but rather by this Court's previous opinions in O'Brien and Jordan which hold that any person arrested for DUI is constitutionally entitled to a jury trial.

VI.

CONCLUSION

In view of the potential three year license suspension and excessive increases in proof of financial responsibility that accompany a conviction for driving under the influence, in view of the statutory system increasing minimum punishments for subsequent offenses, and in view of the opprobrious nature of the offense, it is apparent that DUI is an offense regarded as serious by the people of the State of Hawaii.

The addition of the expedited administrative license revocation procedure in 1991 to the statutory scheme of penalties makes the amended DUI statute even more severe than the statute the Court reviewed in O'Brien.

In determining whether or not the offense was serious for purposes of the right to a jury trial, the Supreme Court in Blanton looked only to the maximum imprisonment authorized as a penalty for driving under the influence. The Court's analysis was too restricted. DUI is a deadly crime and the people of this State through its legislature and in other ways have clearly evinced a

feeling that driving under the influence of intoxicating liquor is a serious crime. Under the Fourteenth Amendment the State of Hawaii cannot deny people charged with DUI the right to a jury trial.

Appellants are aware of the expense involved in providing a jury trial for Appellants charged with DUI and are also aware that prosecutions for DUI take place in the District Courts, courts which by statute cannot accommodate jury trials. These are difficult problems to be sure, but they are not reasons to deny jury trials in cases in which the Constitution guarantees them.

For the foregoing reasons, this Honorable Court is urged to deny the motions for remand to District Court.

DATED: Honolulu, Hawaii, September 16, 1993.

/s/ Arthur E. Ross
ARTHUR E. ROSS
PAUL J. CUNNEY

Attorney for Appellants
GLENN NAKATA and ALVIN K.L. LAU

NO. 17317

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. GLENN NAKATA, Defendant-Appellant.	CR. NO. 90-1679
STATE OF HAWAII, Plaintiff, vs. ALVIN K. L. LAU, Defendant-Appellant.	CR. NO. 90-1657
STATE OF HAWAII, Plaintiff, vs. EDDIE DAOANG, Defendant-Appellant.	CR. NO. 90-1838

STATEMENT OF RELATED CASES

Defendant-Appellant is unaware of any other cases presently pending on appeal involving one or more issues identical to the

instant case, except a Petition for Writ of Mandamus and/or Prohibition filed under Supreme Court No. 17228, JON DAVID WHITTINGTON, Petitioner, v. JAMES H. DANNENBERG, in his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and all other District Court Judges of the State of Hawaii, STATE OF HAWAII, The real party in interest, Respondents.

DATED: Honolulu, Hawaii, September 16, 1993.

/s/ Arthur E. Ross
ARTHUR E. ROSS
PAUL J. CUNNEY

Attorney for Peitioner-Appellant

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the attached document were delivered to the following named party(ies) on September 16, 1993:

	By: U.S. MAIL	HAND DELIVERY
TO: THE OFFICE OF THE PROSECUTING ATTORNEY Keith M. Kaneshiro, Prosecuting Attorney Ronald G. Johnson James M. Anderson Deputy Prosecuting Attorneys City and County of Honolulu Alii Place 1060 Richards Street, 9th Floor Honolulu, Hawaii 96813	( )	( )
Theodore Y. H. Chinn Office of the Public Defender 1130 N. Nimitz Highway, Suite A-135 Honolulu, Hawaii 96817	( )	( )

DATED: Honolulu, Hawaii, September 16, 1993.

/s/ Arthur E. Ross
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DATED: Honolulu, Hawaii, September 16, 1993.

/s/ Arthur E. Ross
ARTHUR E. ROSS
Attorney for Peitioner-Appellant

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Appendix "I"

NO. 17317

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. GLENN NAKATA, Defendant-Appellant.	CR. NO. 90-1679 ON RESERVED QUESTIONS OF LAW PURSUANT TO RULE 15 OF THE HAWAII RULES OF APPELLATE PROCEDURE FIRST CIRCUIT COURT HON. DEXTER DEL ROSARIO, JUDGE
STATE OF HAWAII, Plaintiff, vs. ALVIN K. L. LAU, Defendant-Appellant.	CR. NO. 90-1657
STATE OF HAWAII, Plaintiff, vs. EDDIE DAOANG, Defendant-Appellant.	CR. NO. 90-1838

REPLY BRIEF OF DEFENDANT-APPELLANTS
NAKATA AND LAU

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NO. 17317

IN THE SUPREME COURT OF THE STATE OF HAWAII

STATE OF HAWAII, Plaintiff, vs. GLENN NAKATA, Defendant-Appellant.	CR. NO. 90-1679 ON RESERVED QUESTIONS OF LAW PURSUANT TO RULE 15 OF THE HAWAII RULES OF APPELLATE PROCEDURE FIRST CIRCUIT COURT HON. DEXTER DEL ROSARIO, JUDGE
STATE OF HAWAII, Plaintiff, vs. ALVIN K. L. LAU, Defendant-Appellant.	CR. NO. 90-1657
STATE OF HAWAII, Plaintiff, vs. EDDIE DAOANG, Defendant-Appellant.	CR. NO. 90-1838

REPLY BRIEF OF DEFENDANT-APPELLANTS NAKATA AND LAU

I. A FIRST TIME DUI CHARGE IS A SERIOUS OFFENSE FOR PURPOSES OF ENTITLEMENT TO TRIAL BY JURY WHEN VIEWED IN THE CONTEXT OF THE STATUTORY SCHEME OF HRS § 291-4.

The most direct way to express the issue in this matter is to simply state that the Legislature passed Act 128, SLH 1993, purporting to take away the right to jury trial from past, present and future first time DUI offenders, so that a backlog of DUI jury trials in Circuit Court can be wiped clean. Perhaps the real question is does judicial administrative necessity caused by the partial failure of the court system to control its caseload justify depriving criminal defendants of their right to trial by jury.

What is interesting about Act 128 is that it encompasses the complete DUI statutory scheme. None of the classifications of first, second, third, etc. DUI offenses legislatively travel alone, since they are all intertwined with each other for purposes of sentence enhancement and other obvious reasons. The

underlying definition of the DUI offense is the same for each classification. It makes little sense to hold that a first offense in the context of the statutory scheme, is less serious than a second or third offense and therefore not entitled to a jury trial. It may sound simplistic, but it is true that no defendant can be a second or third time DUI offender without having had a first DUI conviction. Assuming that the presumption of innocence is still applicable, the importance of a jury trial to a first time DUI defendant and the seriousness of a first time DUI charge are evident.

The seminal case in Hawaii on the issues before this Court is State v. O'Brien, 68 Haw 38, 704 P2d 883 (1986). O'Brien, *supra*, holds that a right to a jury trial for DUI defendants is provided by Art. I, §14 of the Hawaii State Constitution. Even though the defendant was a second time offender, the court in O'Brien, *supra* at 885, did not distinguish in its opinion between first, second or third DUI offenders and the entitlement to a jury trial. The court in O'Brien, *supra* at 886-887 stated:

While these 1982 and 1983 amendments reduced the terms of imprisonment applicable to a DUI charge to 180 days, specified mandatory penalties which include community service and suspension or revocation of driver's license were added. Our assessment of this statutory scheme leads us to the conclusion that this framework of punishment reflects the societal belief that drunk driving is a grave and therefore constitutionally serious offense.

As noted above, for a first DUI offense, the convicted offender may receive a sentence of "[n]ot less than forty-eight hours of imprisonment"pursuant to HRS §291-4(b)(1)(C)(ii), along with required terms of alcohol rehabilitation program and license suspension. If a second offense is committed within five years, license suspension and various penalties including imprisonment for not less than forty-eight consecutive hours are called for. A third offense within five years brings a mandatory fine of from $500 to $1000, license revocation, and imprisonment for not less than ten or more than 180 days.

Were we faced with a situation where a first DUI offense was punishable, for example, by imprisonment for no more than five days, a second conviction by imprisonment for no more than ten days and a third, by imprisonment for no longer than one month, we would perhaps be persuaded by State's position that DUI is not a serious offense in the constitutional sense. In light of the sentencing provisions both as they existed at the time of

> O'Brien's conviction and as they read today, we are obliged to reject an argument that the right to a jury trial is not triggered by a DUI conviction.

The court in O'Brien, *supra* at 886-887, did not speak to the issue of whether or not a first time DUI offense is a serious offense in the constitutional sense. The question addressed in O'Brien, *supra*, was whether or not the statutory DUI sentencing scheme made any DUI offense (first, second, third, etc.) a serious offense in the constitutional sense, thereby affording the DUI defendant the right to a jury trial. The O'Brien court did find that the DUI statutory scheme constituted a serious offense and that the impact of the scheme as a whole rendered each separate DUI charge a serious offense for the purpose of entitlement to a jury trial. The court did not concern itself with whether the offense was a first, second, or third offense.

The Legislature in enacting Act 128, SLH 1993, has taken out of context the five day maximum figure for first time offenders used by the Hawaii Supreme Court in O'Brien and used it as a bench mark for what is or is not to be considered a

serious offense. Again the O'Brien court found the serious nature of the DUI offense to be based upon the complete DUI statutory scheme and its framework of mixed punishments. In fact, the U.S. Ninth Circuit Court of Appeals in Dow v. Circuit Court of the First Circuit, 995 F2d 922 (9th Cir. 1993) found that the punishment of compulsory attendance at counterattack classes constituted a sufficient impediment to an individual's liberty interest in violation of 28 USC §2254.

The draconian nature of the DUI statutory scheme and this framework of punishment is no less severe today under Act 128, SLH 1993 than it was eight years ago in HRS §291-4 (Supp. 1984), when O'Brien, *supra* was decided. The moral opprobrium expressed through the DUI statutory scheme is no less today than it was when O'Brien was decided. Any outcry that DUI's are serious crimes by such groups as Mothers Against Drunk Drivers (MADD) has probably been dampened or silenced by the promises of the drafters that Act 128, SLH 1993 will assuredly result in quick and summary convictions for first time

DUI offenders.

It is important to note that the Legislature, in enacting Act 128, did not state in the purpose preamble of the Act, that Act 128, SLH 1993 was intended to overrule the Hawaii Supreme Courts decision in State v. O'Brien, *supra*. The Legislature, in enacting Act 128, did not understand that the O'Brien court based its finding that a DUI charge is a serious charge for purposes of a jury trial upon its assessment of the statutory scheme and not simply a single first time charge. See also State v. Jordan, 825 P2d 1065, 1068 (Hawaii, 1992).

II. THE ELIMINATION OF JURY TRIAL FOR FIRST TIME DUI OFFENDERS IS SIMPLY A QUICK FIX BY THE LEGISLATURE AND THE COURT SYSTEM TO THE JUDICIAL ADMINISTRATIVE CRISIS CAUSED BY THE MISMANAGEMENT OF THE DUI CASE LOAD.

> Our metropolitan criminal courts are too crowded. There are too many cases, too few judges, and inadequate physical resources to cope with the thousands of cases which annually come before them. The constant trend toward urbanization and the steady increases in the rate of urban crime have not been

accompanied by increases in judicial manpower or improvements in judicial machinery adequate to deal with the problem. Frequently, procedures which have their origins in the counties of rural America-or, indeed, the shires and hundreds of ancient Britain-are still utilized in urban courts which handle more cases in a day than came before many of their predecessors in a year. Procedures designed for felony cases have uncritically been accepted as the norm for the judicial determination of misdemeanors and petty offenses. In theory the system still contemplates the adversary trial as the basic device for the disposition of charges, despite the reality that many or most of the cases will be determined by out-of-court plea bargaining in a process which frequently seeks judicial intervention only for the purpose of placing an imprimatur upon a compromise.

...The increase in the numbers of cases alone might have placed more pressure on our system than could be tolerated without increases in manpower and facilities and changes in procedures. But the problem has other dimensions, also.

The criminal courts must now deal with defendants who have constitutional and statutory rights which, if asserted and respected, may pose meaningful bars to summary disposition. *Mapp, Miranda, and Wade* and their progeny provide procedural rights which require regular adjudications of a type rarely involved in prosecutions even a decade ago. Gideon v. Wainwright and the movement toward bail reform

> make the right to a jury trial a practical possibility rather than an illusion, and provided both a viable technique and an incentive to delay by a defendant.
>
> ...I do not suggest that these developments are unfortunate. On the contrary, the so-called revolution in criminal procedure has been, in my opinion, one of the great accomplishments of America during the last decade.
>
> We have eradicated much of the "invidious discrimination" between rich and poor in the criminal process. We have implemented rights which were illusory in the past. A national concept of criminal due process has developed from the decisions which have afforded most of the basic protections of the Bill of Rights to defendant tried in state courts. These are profound and desirable changes. My point is only the obvious one-that the evolution of the criminal process toward a real adversary system in which meaningful rights can be asserted by defendants has placed substantial additional burdens upon our criminal courts. [Footnotes omitted]

The quotations above are from an article by A. Kenneth Pye, Dean of Law, Duke University, which appeared in Mass Production Justice and the Constitutional Ideal, The Mitchie Co. (1970) almost twenty-five years ago. The administrative burden of an urban court system twenty-five years ago was as intense

then as is the administrative burden confronting the Honolulu court system today. The stipulated testimony of Gwen Ha, a representative of the Criminal Assignments Division of the Circuit Court indicates that only one Circuit Courtroom is primarily used for hearing DUI trials and that as of July 30, 1993 three thousand three hundred and seventy-five DUI cases were pending trial. It was not stated what percentage of these were first time DUI offenses. The stipulated testimony of Steven Alm, Misdemeanor Prosecution Director at Paragraph 17 of the Findings of Fact-Reserved Questions of Law indicates that the State very rarely plea bargains any DUI offense to a lesser charge due to the enhanced sentencing scheme provided in HRS §291-4 for repeat offenders.

While an administrative judicial crisis may exist with respect to DUI jury trials, a substantial portion of blame for this crisis lays with a court system that is only willing to allocate primarily one courtroom for DUI jury trials. The court system with its meager allocation of one courtroom has created the

present DUI jury trial crisis. The State is equally culpable for its unwillingness to reduce any DUI charge to a lesser offense for fear of losing the hook of the enhanced sentencing scheme under HRS §291-4 for repeat DUI offenders. The state simply refuses to screen its DUI cases.

In 1993, S.B. 811 provided both the legislature and the court system on opportunity to at least partially alleviate the DUI backlog problem. S.B. 811 would have created an incentive for DAG pleas for first time offenders by removing the SR 22 Proof of Financial Responsibility requirement. S.B. 811 died in committee.

Counsel would admit that some fault lies with the first time offenders since they have refused to gently accept summary adjudication of their charges by a judge and have insisted upon a jury trial. But the primary reason for this judicial administrative crisis involving DUI trials are the above described policies of the court system and the State. Unfortunately first time DUI defendants will pay the price, with the loss of their

right to a jury trial.

The precedent set by this Court in permitting the court system and the State to solve a crisis of their own creation by semantically terminating a constitutional right is dangerous. In five years will the Legislature revise HRS 291-4 et seq. to deprive second time DUI defendants of the right to trial because another backlog DUI crisis exists as a result of the use of only one courtroom for DUI trials and the refusal of the state to reduce DUI charges to lesser offenses?

The Attorney General for Hawaii, in his Amicus Curiae brief at p. 8-24, urges this Court to overrule O'Brien, *supra* and Jordan, *supra*. Defendant disagrees, believing that O'Brien, *supra* and Jordan, *supra*, were correctly decided. It is surprising though the lengths to which the State will go, arguing for the reversal of recent precedent, in order to obtain a quick fix to the State and Court created backlog of DUI cases.

CONCLUSION

The argument that a first time DUI charge is no longer a

"serious" crime for purposes of the right to a jury trial is the penultimate elevation of form over substance. Virtually the same statutory-scheme which led the O'Brien court to conclude that a DUI is a serious crime for jury trial purposes still exists under Act 128, SLH 1993. Nothing has changed, except the addition of the word "petty" to the description of a first-time DUI charge.

In a very real sense, the most important issue before this court may be who bears the responsibility for the backlog of DUI cases in Honolulu. Both the States and the Attorney General's briefs intimate that such responsibility rests with the first time DUI defendant for demanding a jury trial. However, it is the court system which allocates only one courtroom for DUI trials and it is the State which refuses to reduce DUI charges for fear of losing the hook of enhanced punishment for repeat offenders.

DATED: Honolulu, Hawaii, October 7, 1993.

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Supreme Court, U.S.
FILED
JAN 13 1995
OFFICE OF THE CLERK

No. 94-905

In the
Supreme Court of the United States
October Term, 1994

GLENN NAKATA, ALVIN K. L. LAU, and JON DAVID WHITTINGTON,

Petitioners,

vs.

STATE OF HAWAII; JAMES H. DANNENBERG, in his capacity as Judge of the District Court of the First Circuit, State of Hawaii, and all other District Court Judges of the State of Hawaii,

Respondents.

Brief in Opposition to the Petition for a Writ of Certiorari.

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THE QUESTION PRESENTED

Whether this Court has jurisdiction to review the Hawaii Supreme Court's decision to apply retroactively its holding in *State v. Nakata,* 76 Haw. 360, 878 P.2d 699 (1994), which held that first-time Driving Under the Influence of Intoxicating Liquor offenders were not entitled to jury trials, where the Hawaii Supreme Court's decision was based upon independent and adequate state law grounds?

LIST OF PARTIES AFFECTED

The decision of the Hawaii Supreme Court affects all pending cases for first-time Driving Under the Influence of Intoxicating Liquor offenders who demanded jury trials.

TABLE OF CONTENTS

THE QUESTION PRESENTED i

LIST OF PARTIES AFFECTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 10

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO REVIEW THE HAWAII SUPREME COURT'S DECISION TO APPLY RETROACTIVELY ITS HOLDING IN NAKATA TO ALL PENDING FIRST-OFFENSE DUI OFFENDERS WHO DEMANDED JURY TRIALS, WHERE THE HAWAII SUPREME COURT EXPRESSLY RESTED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS. 11

A. THE APPLICABLE LAW. 12

B. THE HAWAII SUPREME COURT'S HOLDING IN NAKATA THAT THE RIGHT TO JURY TRIAL DID NOT ATTACH TO THE CONSTITUTIONALLY PETTY FIRST-TIME DUI OFFENSE RESTED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS. 13

C. THE HAWAII SUPREME COURT'S DECISION TO APPLY RETROACTIVELY ITS HOLDING IN NAKATA RESTED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS. 16

CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Blanton v. North Las Vegas, 489 U.S. 538, 109 S.Ct.1289, 103 L.Ed.2d 550 (1989) 5, 14, 15

Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) 12, 13, 16

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, *reh'g denied*, 392 U.S. 497, 88 S.Ct. 2270, 20 L.Ed.2d 1412 (1968) 5

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932) 17, 18

Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) 9, 17

Harper v. Virginia Dept. of Taxation, 509 U.S. ___, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) 9, 17

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) 13, 16

Russell v. Blackwell, 53 Haw. 274,
492 P.2d 953 (1972) 8

State v. Ikezawa, 75 Haw. 68,
857 P.2d 593 (1993) 8, 9, 10, 16, 17

State v. Nakata, 76 Haw. 360,
878 P.2d 699 (1994) ..... *passim*

State v. O'Brien, 68 Haw. 38,
704 P.2d 883 (1985) 14

State v. Santiago, 53 Haw. 254,
492 P.2d 657 (1971) 8, 16

State v. Shak, 51 Haw. 612, 446 P.2d 422,
cert. denied, 400 U.S. 930, 91 S.Ct.
191, 27 L.Ed.2d 190 (1970) 13-14

State v. Wilson, 75 Haw. 68,
856 P.2d 1240 (1993) 6, 7, 13, 14

Trucking Assns v. Smith, 496 U.S. 167,
110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) 15, 17

United States v. Natchtigal, ___ U.S. ___,
113 S.Ct. 1072, 122 L.Ed.2d 374 (1993) 5

STATUTES

28 U.S.C Section 1257 12

Hawaii Revised Statutes ..... *passim*

RULES

Rules of the Supreme Court of the United States
Rule 10.1(b) 19

Rules of the Supreme Court of the United States
Rule 10.1(c) 14

CONSTITUTIONAL PROVISIONS

Hawaii State Constitution, Article I, Section 14 13

LEGISLATIVE AUTHORITIES

Act 128, Session Laws of Hawaii,
17th Legislature,
Regular Session (1993) ..... *passim*

STATEMENT OF THE CASE

The police arrested Petitioners GLENN NAKATA, ALVIN LAU, and JON DAVID WHITTINGTON ("Petitioners"), on July 30, 1990, June 10, 1990, and "sometime before May 4, 1993," respectively (the record does not reflect Petitioner Whittington's exact arrest date), for the offense of Driving Under the Influence of Intoxicating Liquor ("DUI"), in violation of Section 291-4, Hawaii Revised Statutes ("H.R.S."). *See State v. Nakata*, 76 Haw. 360, 878 P.2d 699, 701- 02 and n 4 (1994); *see also* Appendix A to Petitioners' Petition For A Writ of Certiorari ("Petition"). The instant charges were Petitioners' first DUI offenses, and each Petitioner requested a jury trial. *Nakata*, *supra*, 878 P.2d at 702.

At the time of the arrests of Petitioners Nakata and Lau, the statutory penalty under Section 291-4, H.R.S. for a first DUI conviction included a minimum of forty-eight hours but not more than 180 days of imprisonment. *Nakata*, *supra*, 878 P.2d at 703 and n 5. A first-time DUI offender could also be sentenced to a fourteen-hour alcohol abuse rehabilitation program, a ninety-day license suspension, seventy-two hours of community service work, and a fine of not less than $150 but no more than $1,000. *Nakata*, *supra*, 878 P.2d at 703.

Effective August 1, 1991, the 1990 legislative amendment to Section 291-4, H.R.S. reduced the maximum term of imprisonment for a first DUI conviction from 180 days to thirty days. *Id.* The 1990 legislative amendment also gave the sentencing court the discretion to order the installation of an "ignition interlock system," a device which could be affixed to a vehicle's ignition system and which prevents the

vehicle from being started without first testing a sample of the driver's breath for blood-alcohol concentration. *Nakata*, *supra*, 878 P.2d at 703 and n 7.

In 1993, the Hawaii legislature enacted Act 128, 1993 Session Laws of Hawaii 179 ("Act 128"), which became effective on May 21, 1993. *Nakata*, *supra*, 878 P.2d at 701, 703. Act 128 provided for the reduction of the maximum term of imprisonment for a first DUI conviction from thirty days to five days, and eliminated the ignition interlock system provision. *Id.* In enacting Act 128, the Hawaii legislature stated clearly its intent to eliminate the first DUI offender's option of having a jury trial. *Id.* The Hawaii legislature also expressly provided for the retroactive application of Act 128 to all pending first-offense DUI cases. *Id.* The Hawaii legislature stated, in pertinent part:

> It is the intent of the legislature that individuals charged with the offense of driving under the influence of intoxicating liquor as a first time offender shall not be entitled to a jury trial.
>
> The purpose of this Act is to reduce the penalties for first time offenders so that there can be no question that, as to first time offenders, the offense is a "petty offense" in the constitutional sense, to which no right to jury trial attaches. The legislature finds that those offenders who are convicted repeatedly of driving under the influence of intoxicating liquor represent a serious social problem. They have been unwilling to modify their behavior and represent a continuing dangerous presence on the

roadway. First time offenders, however, represent less of a threat to society, as most will respond to corrective action.

The amended penalty provisions for first time offenders shall be retroactive for all pending first time offense cases for driving under the influence of intoxicating liquor.

It is the intent of the legislature that the reduced penalties provided for in the Act apply to all pending first offense cases. The legislature further intends that by making the reduced penalties provided for in this Act retroactive to pending cases, it be made clear that such first offenders are not entitled to a jury trial, as the offense is a "petty offense" in the constitutional sense.

Act 128, Section 1, 1993 Sessions Laws of Hawaii at 179-80 (emphasis supplied); *see also Nakata*, *supra*, 878 P.2d at 704, 708.

After Act 128 became effective, Respondent State of Hawaii ("Respondent"), moved to remand the cases of Petitioners Lau and Nakata to the district court for bench trials. *Nakata*, *supra*, 878 P.2d at 701. The First Circuit Court of the State of Hawaii ("circuit court"), consolidated Petitioners' cases, and on June 30, 1993, issued findings of fact (*see* Appendix D to the Petition), in reserving the following two questions of law to be decided by the Hawaii Supreme Court:

1. Whether the amendments to the sentencing provisions of H.R.S. [Section] 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of

> 1993, effective May 21, 1993, eliminate[ ] the right to jury trial for defendants charged with a first offense under H.R.S. [Section] 291-4.
>
> 2. If the amendments to the sentencing provisions of H.R.S. [Section] 291-4 provided in Act 128, Session Laws of Hawaii, Regular Session of 1993, effective May 21, 1993, do eliminate the right to jury trial, whether the deprivation of such a right may be applied retrospectively to alleged offenses occurring prior to the enactment of the Act.

Nakata, *supra*, 878 P.2d at 702; *see also* Appendix D to the Petition.

With respect to Petitioner Whittington, following his arrest for DUI, he demanded a jury trial in the state district court on May 4, 1993. *Nakata*, *supra*, 878 P.2d at 702 and n 4. The state district court denied Petitioner Whittington's demand based upon the Hawaii legislature's enactment of Act 128, and set Petitioner Whittington's bench trial. *Nakata*, *supra*, 878 P.2d at *702; see also* Appendix G to Petition. Petitioner Whittington subsequently filed a "petition for writ of prohibition and/or mandamus." *Nakata*, *supra*, 878 P.2d at 702. Inasmuch as the Hawaii Supreme Court's "disposition of the reserved questions would also dictate the disposition of Whittington's petition[,]" the Hawaii Supreme Court consolidated the cases of all three Petitioners. *Id.*

The Hawaii Supreme Court answered the first reserved question, *i.e.*, whether a first-time DUI offender had a right to jury trial, in the negative.

Nakata, *supra*, 878 P.2d at 704-713. In reaching that decision, the court found that under federal law a first-time DUI offender had no such right. *Nakata*, *supra*, 878 P.2d at 704-06. Under the court's federal law analysis, the court found that the sixth amendment to the United States Constitution provided for a speedy and public trial by an impartial jury in all criminal prosecutions. *Nakata*, *supra*, 878 P.2d at 704. However, the court found that this right is not absolute, as the sixth amendment's guaranty of a jury trial did not extend to "petty offenses." *Id.*, quoting *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 *reh'g denied, 392 U.S. 497, 88 S.Ct. 2270, 20 L.Ed. 2d 1412* (1968), and *Blanton v. North Las Vegas*, 489 U.S. 538, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989).

The Hawaii Supreme Court held that, under federal law, the first DUI offense is presumed constitutionally petty. *Nakata*, *supra*, 878 P.2d at 706. The court based its holding in large part upon the fact that the maximum authorized term of imprisonment for the offense is only five days. *Nakata*, *supra*, 878 P.2d at 704-05, quoting *Blanton*, *supra*. Moreover, the court further found that the additional possible "mix of penalties"— which included a ninety-day driver's license suspension, fourteen hours of alcohol abuse rehabilitation classes, seventy-two hours of community service work, a fine between $150 and $1,000, proof of financial responsibility before being eligible to reapply for a driver's license as required by statute, and other collateral costs—did not "overcome the federal presumption that such offense is petty." *Nakata*, *supra*, 878 P.2d at 705, quoting *United States v. Nachtigal*, __ U.S. __, 113 S.Ct. 1072, 122 L.Ed.2d 374 (1993); *see also Blanton*, *supra*. The Hawaii Supreme

Court accordingly ruled that, under the United States Constitution, Petitioners were not entitled to jury trials for their first DUI offenses under Section 291-4, H.R.S., as amended by Act 128. *Nakata*, *supra*, 878 P.2d at 706.

The Hawaii Supreme Court, however, did not rest its decision in *Nakata* upon its analysis of federal law. Instead, the court made clear its decision was based upon independent state law. In so doing, the court held that, under the provisions of the Hawaii Constitution, a defendant has a right to a speedy and public trial by an impartial jury in all criminal prosecutions. *Nakata*, *supra*, 878 P.2d at 706. The court held, however, the right is not absolute and does not attach to petty offenses. *Id.*, quoting *State v. Wilson*, 75 Haw. 68, 856 P.2d 1240 (1993). In reaching the conclusion that the first DUI offense is a petty offense, the Hawaii Supreme Court applied its three-pronged test as set forth in *Wilson*. Under the *Wilson* test, the court was required to consider: (1) the treatment of the offense at common law; 2) the gravity of the offense; and (3) the authorized penalty. *Nakata*, *supra*, 878 P.2d at 706.

As the offense of DUI did not exist at common law, the Hawaii Supreme Court found the first prong of the *Wilson* test to be inapplicable. *Nakata*, *supra*, 878 P.2d at 713 n. 20. In its analysis of the second prong of the *Wilson* test, the gravity of the offense, the court acknowledged as controlling the legislature's view of the critical difference between first-time DUI offenders and repeat DUI offenders. *Nakata*, *supra*, 878 P.2d at 708. In so doing, the court stated that the legislature's "unequivocal...statement provide[d] a strong indication of society's view of first offense DUI."

Nakata, supra, 878 P.2d at 708. The court pointed out that the legislature, in promulgating Act 128, stated that the DUI offenders who represented a serious social problem were those "who [we]re convicted repeatedly of [DUI]." *Id.* On the other hand, the legislature found that first-time DUI offenders represented "less of a threat to society, as most will respond to corrective action." *Id.*

With respect to the final prong of the *Wilson* analysis, the authorized penalty, the Hawaii Supreme Court considered the statutorily authorized penalty and the 1990 and 1993 legislative amendments regarding the same. *Nakata, supra*, 878 P.2d at 707-08. The court recognized that in providing for a maximum term of imprisonment of five days, the legislature intended to make clear that there would be "no question" that it viewed the first-time DUI offense as constitutionally petty. *Nakata, supra*, 878 P.2d at 708. Moreover, the court declared, "it is now clear that the legislature has *always* viewed first time DUI offenses as petty." *Nakata, supra*, 878 P.2d at 708 (emphasis supplied and omitted; citation omitted). The court concluded:

> In sum, applying the three-part test from *Wilson*, we now hold that a charge of first-offense DUI under *H.R.S.* [Section] 291-4, as amended by Act 128, is constitutionally petty. The distinction between first and repeat offenders in *Act* 128's legislative history is critical, and the maximum mix of statutory penalties does not compel a different result. Being a constitutionally petty offense, no right to jury trial attaches to first-offense DUI.

Nakata, supra, 878 P.2d at 713.

The Hawaii Supreme Court also determined the second reserved question, *i.e.*, whether its decision in *Nakata*, holding that the right to jury trial did not attach to a first DUI offense, could be retroactively applied to all pending first DUI offenders who demanded jury trials, in the negative. *Nakata, supra*, 878 P.2d at 713-17. As they did below, Petitioners contend in their instant Petition that the Hawaii Supreme Court's retroactive application of its holding in *Nakata* "depriv[es] them of a vested substantive and fundamental right" in violation of due process. *Nakata, supra*, 878 P.2d at 715; *see also* Petition at 27-30.

In deciding whether retroactive application of its decision in *Nakata* would be fundamentally fair, the Hawaii Supreme Court utilized its "selective-retroactive doctrine" test as set forth in *State v. Ikezawa*, 75 Haw. 210, 857 P.2d 593 (1993). *Nakata, supra*, 878 P.2d at 716-17. Under the "selective-retroactive doctrine" test, the court was required to consider the following three factors in deciding whether the court would, in its discretion, apply a decision retroactively: (1) the purpose to be served by the newly announced rule; (2) the extent of reliance by law enforcement authorities on the old standards; and (3) the effect on the administration of justice of a retroactive application of the new standards. *Nakata, supra*, 878 P.2d at 716, quoting *Ikezawa*, 75 Haw. at 220, 857 P.2d at 598 (citing to *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971), and *Russell v. Blackwell*, 53 Haw. 274, 492 P.2d 953 (1972)). As stated by the Hawaii Supreme Court, "implicit in these factors is the concept of fairness." *Id.*

The Hawaii Supreme Court acknowledged that

its "selective-retroactive doctrine" test was not the test utilized by the United States Supreme Court to determine whether new rules of criminal law would be applied retroactively. *Nakata*, *supra*, 878 P.2d at 717. The court indicated that under federal law, limits on retroactivity of new rules of criminal law and procedure had been eliminated, and that "all newly declared...rule[s] must be applied retroactively to all criminal cases pending on direct review." *Nakata*, *supra*, 878 P.2d at 717 (emphasis supplied), quoting *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and *Harper v. Virginia Dept. of Taxation*, 509 U.S. __, 113 S.Ct. 2510, 125 L.Ed.2d 74, 85 (1993). The court then said:

> We acknowledge that this recent United States Supreme Court case law, by overruling the doctrinal foundation of Hawaii case law, could call into question our continued adherence to *Ikezawa*. However, relying on independent state law grounds, we choose to follow the more flexible test we reiterated in *Ikezawa* when determining whether to retroactively apply decisions of state law made by this court.

Nakata, *supra*, 878 P.2d at 717 (emphasis supplied).

The Hawaii Supreme Court held that Petitioners had failed to show that they would be substantially prejudiced by the retroactive application of its decision in *Nakata*. *Nakata*, *supra*, 878 P.2d at 717. In fact, the court held, Petitioners "would receive an impartial trial, albeit a non-jury trial," and if convicted, would face lesser penalties. *Id.* Therefore, the court ruled, "retroactive application of [the holding in *Nakata*] to

pending cases passes the [fundamental fairness] test enunciated in *Ikezawa*. Accordingly, we answer the second reserved question in the affirmative." *Nakata*, *supra*, 878 P.2d at 717, 718-19.

SUMMARY OF THE ARGUMENT

The Hawaii Supreme Court's decision to give retroactive effect to its holding in *Nakata* rested upon independent and adequate state law. Therefore, under this Court's own rules, there is no jurisdiction over the matter.

In analyzing whether a first-time DUI offense was petty or serious under the terms of the Hawaii Constitution, the Hawaii Supreme Court applied its own three-pronged test as set forth in *Nakata*. The three factors the *Nakata* court was required to consider are: (1) the historical treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty. The court's three-pronged test required the consideration of the offense's authorized penalty, a factor minimally required under the federal analysis when determining whether an offense is petty or serious. Thus, the Hawaii Supreme Court's decision that the right to jury trial did not attach to the first-time DUI offense, because the offense was constitutionally petty, rested on independent and adequate state law grounds.

In deciding it would retroactively apply its holding in *Nakata* to first DUI offenders who requested jury trials, the Hawaii Supreme Court applied its own "selective-retroactive doctrine" test, which it expressly held to be the relevant test under state law. The "selective-retroactive doctrine" test requires an analysis

of three factors: (1) the purpose to be served by the newly announced rule; (2) the reliance placed on the previous view of the law; and (3) the effect on the administration of justice of a retroactive application of the new rule. This Court, however, does not utilize the "selective-retroactive doctrine" test, but rather mandates that newly announced rules of criminal law be applied retroactively. Thus, the Hawaii Supreme Court's decision to apply retroactively its decision in *Nakata* rested upon independent and adequate state law as well.

Inasmuch as the Hawaii Supreme Court's decision rested on independent and adequate state law grounds, this Court, pursuant to its own rules, has no jurisdiction to review the court's decision in *Nakata*. Furthermore, Petitioners have not shown in their petition, as they must in order for this Court to accept review, that the Hawaii Supreme Court decided a federal question in a way that conflicts with either the decision of another state court of last resort or of a United States court of appeals, or with applicable decisions of this Court. As such, this Court should decline review of their Petition.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO REVIEW THE HAWAII SUPREME COURT'S DECISION TO APPLY RETROACTIVELY ITS HOLDING IN *NAKATA* TO ALL PENDING FIRST-OFFENSE DUI OFFENDERS WHO DEMANDED JURY TRIALS, WHERE THE HAWAII SUPREME COURT

EXPRESSLY RESTED ITS DECISION ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

Petitioners argue that the Hawaii Supreme Court's retroactive application of its decision in *Nakata* was "inherently prejudicial and unfair so as to constitute a violation of Due Process under the United States Constitution." Petition at 27. Petitioners identify the "prejudice" they suffered from the court's decision to apply retroactively *Nakata* as the divesture of the fundamental right to a jury trial, which had been extended to them under previous Hawaii case law. Petition at 26, 28-29. Notwithstanding Petitioners argument, they fail to provide either federal or state authority in support of their argument.

A. THE APPLICABLE LAW.

With respect to petitions brought pursuant to 28 U.S.C. Section 1257, it is well-settled that this Court will not review a state court decision which is clearly based on adequate and independent state law grounds. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640, 655 (1991). In *Coleman*, this Court stated:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural. In the context of

> direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory.

Coleman, *supra*, 115 L.Ed.2d at 655 (citations omitted); *accord*, *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) ("If the state court decision indicates clearly and expressly that it is alternately based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

B. THE HAWAII SUPREME COURT'S HOLDING IN *NAKATA* THAT THE RIGHT TO JURY TRIAL DID NOT ATTACH TO THE CONSTITUTIONALLY PETTY FIRST-TIME DUI OFFENSE RESTED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

In *Nakata*, the Hawaii Supreme Court held that the right to jury trial did not attach to constitutionally petty offenses. *Nakata*, *supra*, 878 P.2d at 706-13. In so holding, the court made clear that under Article I, Section 14 of the Hawaii Constitution the first-time DUI offense is constitutionally petty. *Nakata*, *supra*, 878 P.2d at 706-13, quoting *Wilson*, *supra*, 856 P.2d 1240, 1243 (citing to *State v. Shak*, 51 Haw. 612, 466 P.2d 422, *cert. denied*, 400 U.S. 930, 91 S.Ct. 191, 27

L.Ed.2d 190 (1970) (defendant charged with a petty crime does not have the right to a jury trial)).

In declaring that the first DUI offense is constitutionally petty under the provisions of the Hawaii Constitution, the Hawaii Supreme Court in *Nakata* utilized the three-pronged test which it first announced in *Shak*, "refined" in *State v. O'Brien*, 68 Haw. 38, 41-43, 704 P.2d 883, 885-87 (1985), and reaffirmed as the relevant test under the state constitution in *Wilson*. *Nakata*, *supra*, 878 P.2d at 706-07. The *Wilson* test requires a court to consider: (1) the treatment of the offense at common law; (2) the gravity of the offense; and (3) the authorized penalty. *Nakata*, *supra*, 878 P.2d at 706; *see Wilson*, 75 Haw. at 74, 856 P.2d at 1244. Because the *Wilson* test includes the "authorized penalty" factor in its analysis of whether the first DUI offense is a petty or serious offense, the test comports with the standard recognized by this Court in *Blanton*. *See* Rule 10.1(c), Rules of the Supreme Court of the United States.

In *Blanton*, the United States Supreme Court held that the right to jury trial is not absolute, and does not attach by right to petty offenses. *Blanton*, 489 U.S. at 541. Thus, in determining whether the right to jury trial attaches to a particular offense, the Court first determines whether the offense is petty or serious. *Id.* In making such a determination, the *Blanton* Court stated that primary emphasis must be placed on the maximum term of imprisonment because "it is the most powerful indication whether an offense is serious." *Blanton*, 489 U.S. at 542.

In holding that a first DUI offense is petty under the Hawaii Constitution, the Hawaii Supreme Court in *Nakata* considered the five-day maximum

authorized period of imprisonment for the first offense, as well as the additional possible statutory "mix of penalties" as required by *Blanton*. *Nakata*, *supra*, 878 P.2d at 706-13; *see Blanton*, 489 U.S. at 542. The court also considered the historical treatment of the offense, and the societal perception of the gravity of the offense. *Nakata*, *supra*, 878 P.2d at 706-13. By requiring a court to consider the treatment of the offense at common law and the societal view of gravity of the offense, in addition to the authorized penalty, the *Wilson* test is clearly more rigorous than its federal counterpart, and as a result inures to Petitioners' benefit. *See Trucking Assns v. Smith*, 496 U.S. 167, 178-79, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (held, federal law sets certain minimum requirements which the states must meet, but the states may exceed those minimal federal requirements in providing relief under state constitutions).

In sum, in holding that the first-time DUI offense is constitutionally petty under the Hawaii Constitution, the Hawaii Supreme Court utilized its own, unique *Wilson* three-pronged test. Although the Hawaii Supreme Court in *Nakata* acknowledged the federal test in *Blanton*, the court did not base its decision that the first DUI offense is constitutional petty—and thus did not afford such offenders the right to jury trial—on that test. The court did, however, include the federal test in its own three-pronged test, and thus provided Petitioners with what was minimally required under federal law. *Smith*, *supra*.

Therefore, inasmuch as the Hawaii Supreme Court expressly rested its holding in *Nakata* upon independent state law, and included in its analysis what was required under federal law as well, the

court's decision thus rested upon independent and adequate state law grounds. *Coleman*, *supra*, 115 L.Ed.2d at 658. As such, this Court has no jurisdiction to review the matter. *Coleman*, *supra*, 115 L.Ed.2d at 655; *Long*, 463 U.S. at 1041.

C. THE HAWAII SUPREME COURT'S DECISION TO APPLY RETROACTIVELY ITS HOLDING IN *NAKATA* RESTED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS.

Petitioners contend that the Hawaii Supreme Court's decision to apply retroactively its holding in *Nakata* violated due process concerns. *See* Petition at 27-30. However, as will be demonstrated below, the Hawaii Supreme Court's decision to apply retroactively its holding in *Nakata* was fundamentally fair, and thus proper.

In deciding to apply retroactively its decision in *Nakata*, the Hawaii Supreme Court employed its own "selective-retroactive doctrine" test first announced in *Santiago*, and reaffirmed in *Ikezawa*. *Nakata*, *supra*, 878 P.2d at 716-17. The "selective retroactive doctrine" test entails an analysis of three factors: (1) the purpose to be served by the newly announced rule; (2) the reliance placed on the previous view of the law; and (3) the effect on the administration of justice of a retroactive application of the new rule. *Id.*

The Hawaii "selective-retroactive doctrine" test is qualitatively more demanding than its federal counterpart. Indeed, federal law categorically mandates that "new rule[s] for the conduct of criminal prosecutions [are] to be applied retroactively to all cases, state

or federal, pending direct review or not yet final, with no exception[.]" *Griffith v. Kentucky*, 479 U.S. at 328; *accord Harper, supra*, 125 L.Ed.2d at 85. This Court has held, however, notwithstanding the above mandate, "[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *Smith*, 496 U.S. at 117, quoting *Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S.Ct. 145, 77 L.Ed. 360 (1932).

Thus, where the United States Supreme Court mandates the retroactive application of all new criminal decisions, the Hawaii Supreme Court evaluates the merits and demerits of retroactive application of newly announced criminal decisions under state law. The Hawaii Supreme Court will not retroactively apply a newly announced rule of criminal law if retroactive application causes injustice or hardship. *See e.g., Ikezawa supra* (held, no retroactive application of new rule of criminal law if the defendant would suffer injustice and hardship as a result). Mindful of this Court's mandate that all new rules of criminal law or procedure shall be applied retroactively, the Hawaii Supreme Court in *Nakata* stated:

> We acknowledge that this recent United States Supreme Court case law, by overruling the doctrinal foundation of Hawaii case law, could call into question our continued adherence to *Ikezawa*. However, relying on independent state law grounds, we choose to follow the more flexible test we reiterated in *Ikezawa* when determining whether to

> retroactively apply decisions of state law made by this court.

Id. (emphasis supplied).

In so holding, the court determined that Petitioners would suffer neither injustice nor hardship from the retroactive application of its decision in *Nakata*. *Nakata*, *supra*, 878 P.2d at 717. The court noted that Petitioners would still receive a fair trial before a neutral magistrate, and would face lesser penalties under the amended version of the DUI statute. *Id.*

Consequently, the Hawaii Supreme Court's decision to apply retroactively its holding in *Nakata* rested upon independent and adequate state law grounds *Coleman*, *supra*, 115 L.Ed.2d at 658. Therefore, this Court has no jurisdiction over the matter (*Coleman*, *supra*, 115 L.Ed.2d at 655; *Long*, 463 U.S. at 1041), and should honor the Hawaii Supreme Court's decision. *See Great Northern R. Co.*, *supra* (held, "the federal constitution has no voice upon the subject" of whether a state court may decline to give its decision retroactive effect).

CONCLUSION

Based on the foregoing argument and authority, this Court should not entertain review of the Petition. The Hawaii Supreme Court's decision to give retroactive effect to its holding in *Nakata*—holding that the right to jury trial does not attach to first DUI offenses—was based upon independent and adequate state law grounds. Thus, this Court has no jurisdiction over the matter.

Petitioners have not shown in their Petition, as they must in order for this Court to accept review, that the Hawaii Supreme Court either decided a "federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals[,]" or decided a "federal question in a way that conflicts with applicable decisions of this Court." *See* Rule 10.1(b) and (c), Rules of the Supreme Court of the United States. Indeed, in view of the fact that the Hawaii Supreme Court rested its decision in *Nakata* on independent and adequate state law grounds, Petitioners are not able to make such a requisite showing. As such, this Court should decline review of their Petition.